

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 19~~14~~¹⁵

No. [REDACTED] 165

UTICA BANK, PLAINTIFF IN ERROR,

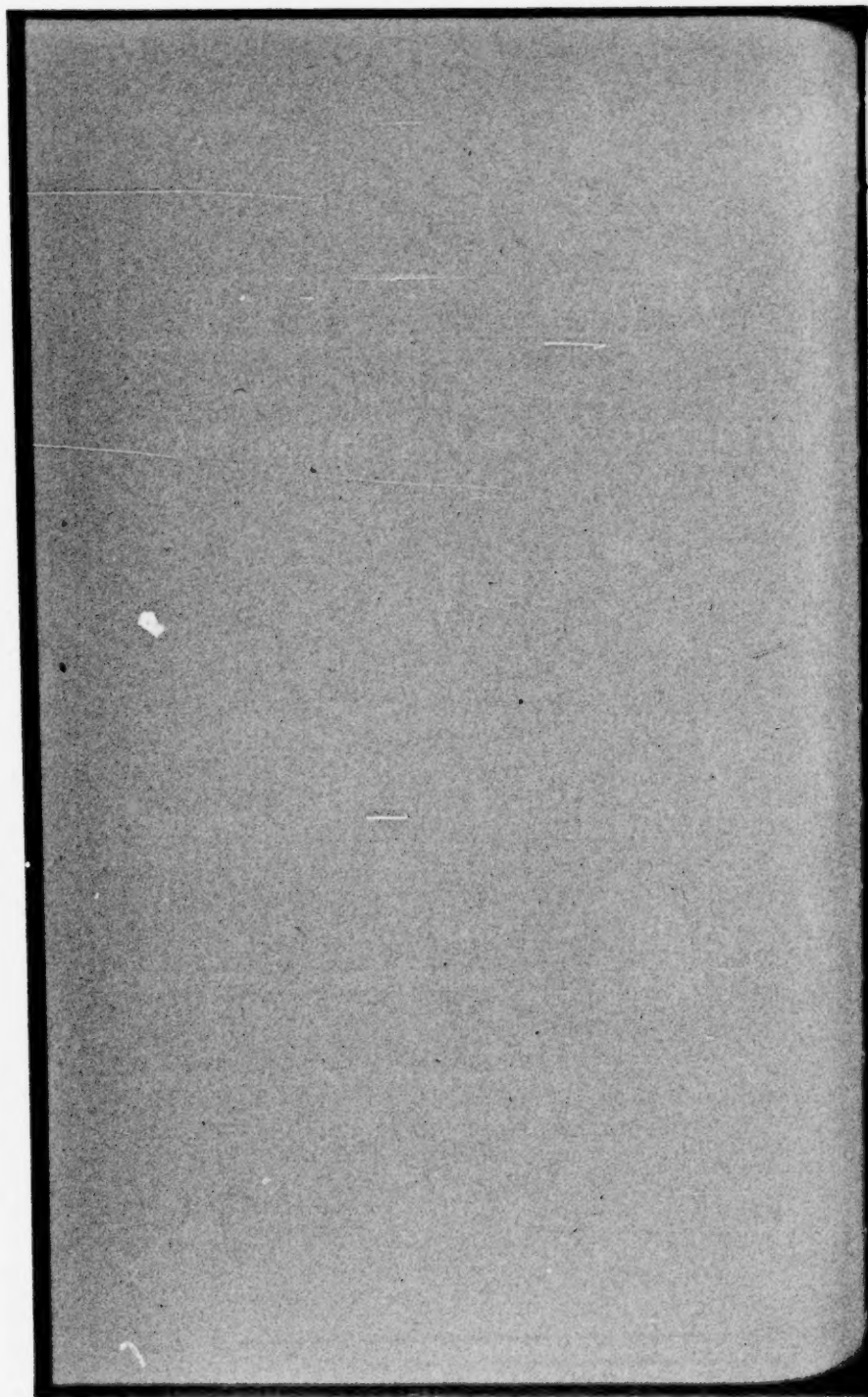
vs.

CHARLES E. YATES AND LOUISA HAMER, ADMINISTRA-
TRIX OF THE ESTATE OF ELLIS P. HAMER, DE-
CEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

FILED MAY 26, 1914.

(24,242)



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 503.

UTICA BANK, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES AND LOUISA HAMER, ADMINISTRA-
TRIX OF THE ESTATE OF ELLIS P. HAMER, DE-
CEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

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1-4

UTICA BANK

v.
YATES.

No. 17278.

Pleas Before the Supreme Court of the State of Nebraska, at a Term Thereof Begun and Holden at the Capitol, in the City of Lincoln, in said State, on the 6th Day of January, 1914.

Present:

Hon. Manoah B. Reese, Chief Justice.

Hon. John B. Barnes, Judge.

Hon. Charles B. Letton, Judge.

Hon. Jacob Fawcett, Judge.

Hon. William B. Rose, Judge.

Hon. Samuel H. Sedgwick, Judge.

Hon. Francis G. Hamer, Judge.

Attest:

H. C. LINDSAY, *Clerk.*

Be it remembered, That on the 5th day of August, 1911, there was filed in the office of the clerk of said supreme court a certain Transcript in the words and figures following, to-wit:

* * * * *

5 In the District Court of Seward County, Nebraska.

THE UTICA BANK, Plaintiff,

vs.

CHARLES W. MOSHER, HOMAN J. WALSH, CHARLES E. YATES, ELLIS P. Hamer, Ambrose P. S. Stuart, Richard C. Outcalt, and Rollo O. Phillips, Defendants.

Amended Petition.

The plaintiff (for its amended petition) complains of the defendants and alleges that the plaintiff is a corporation duly organized and doing a general banking business with its principal place of business at Utica, Nebraska.

That on, prior, and subsequent to the 9th day of December, 1892, and at the several times hereinafter mentioned, the defendants acted as the directors and officers of the Capital National Bank; that they acted as such officers and directors and as such had the control and management thereof and which said Capital National Bank was a corporation duly organized and doing a general banking business in the City of Lincoln, Nebraska.

That (acting) as such directors and officers of said bank, it became and was the duty of the defendants and each of them under the law as well as the by-laws of said Bank to actively and actually manage and superintend the business of the same, to examine the books of said Bank including loans and discounts, to examine the loans made, to whom made, the security therefor, and when due; to see that the general condition of said Bank corresponded with its Books, to see that the resources and liabilities of said Bank corresponded with the

6 books of said Bank, to see that all notes and bills receivable held by said Bank and entered upon its books and in its statements as valuable assets were in fact good valuable and collectable and to see that all such as were worthless or of little or no value were charged off from the assets of said Bank and not included in its statements, to see that the valuable effects, assets, and other matters including the cash on hand (and in other banks or depositories) agreed with the books of said Bank.

That the defendants and each of them failed to perform the aforesaid duties and each and all of them imposed upon them by law, and by the by-laws of said Bank, and by reason of such failure large loans were made by the Bank to insolvent persons upon inadequate or no security, and to its officers and to those who were relatives and favorites of the defendants as officers (or acting officers) of the Bank.

That the books of said Bank were out of balance, that they allowed and permitted forced balance to be made and carried on the Bank books, the deposit account was falsified, being greatly understated, the real estate, bills receivable, and deposit account each being largely inflated, that they permitted to be carried on the books of the Bank and permitted and caused to be (printed and) published statements and advertisements, wherein they included as valuable assets of the Bank large and numerous notes and bills receivable from persons as due and owing to the Bank from persons who were worthless and irresponsible, and also included in their statements of the resources and liabilities of said Bank, and also upon its books as good and valuable, numerous notes, bills receivable and other resources in large amounts that were either wholly worthless or of little or no value, and also permitted large amounts of notes, bills receivable and other items, due the Bank to remain past or overdue, without taking steps to collect or secure the same, whereby the

7 same were lost to the Bank and became and were entirely worthless; and they permitted and continued from time to time to carry such worthless and valueless notes, bills receivable, and other assets upon the books of said Bank as a part of its valuable and available assets when they knew, or should by proper diligence and examination have known the same to be wholly worthless and of no value, and from time to time they published (permitted, allowed) and caused to be (printed and) published to the public and informed and represented to plaintiff (and sent by defendants and their agents to plaintiff through the United States mails and otherwise) in the numerous statements made by them to plaintiff that such notes, bills receivable, and other worthless assets were good and collectable and part of the valuable resources and

effects of said Bank when in truth and in fact they knew (and were in duty bound to know) said statements and each and all of them to be false and utterly untrue; that the resources of said Bank were largely inflated and the liabilities thereof largely shrunken, and the published statements and advertisements (and the statements sent by defendants to plaintiff as aforesaid) and the books of the Bank did not show its true condition in this that the Bank by its books and the published statements and advertisements (and the statements by defendants to plaintiff as aforesaid) showed that it was in good sound financial condition when it was in truth and in fact in an insolvent condition, and was and had been in an insolvent condition since and prior to December 9th, 1892, and that such insolvency resulted from the careless and negligent manner in which the defendant (acting) as such directors and officers managed and superintended the Bank and its said business, and all of which facts and circumstances the defendants and each of them, had full knowledge, and it was the duty of each of them under the law to so know and inform themselves regarding the true condition of said Bank.

8 That after said Bank became insolvent as aforesaid the defendants made (caused, allowed and permitted to be made) statements to the plaintiff and the public (and sent and delivered to the plaintiff statements of its condition,) showing said Bank to be solvent, its capital stock unimpaired, and a surplus on hand, and so continued to publish, (cause, allow, and permit to be published and sent and gave to plaintiff) said statement showing it in the condition aforesaid until it closed its doors and ceased doing business on January 21st, 1893. That after the insolvency aforesaid it continued to pay out large semi-annual dividends on its stock of from 4 to 8 per cent until within a short time of its closing its doors as aforesaid and ceasing to do business.

That after said Bank became insolvent as aforesaid the said defendants permitted said Bank to continue in business and receive deposits from plaintiff and others, the defendants having knowledge of such insolvency, or ought to have known, and could have known, by the exercise of ordinary care in the discharge of their duties as directors (or acting as directors) but of the insolvency of said Bank this plaintiff was at all times entirely ignorant.

That while said Bank was insolvent as aforesaid the defendants negligently and fraudulently caused and permitted advertisements and statements to be made and published in the Lincoln, Nebraska, daily and weekly newspapers, (and as aforesaid caused and permitted to be made and sent and delivered to plaintiff, statements of the Bank's condition) setting forth the solvency of said Bank for the purpose of inducing plaintiff and others, and the public generally, to deposit and keep money in said Bank, and the plaintiff relying upon said published statements (and upon the statements of its financial condition sent to and received by plaintiff as aforesaid) as it had the right to do, deposited and loaned its money to said Bank as hereinafter stated.

9 That if it had not been for such false statements aforesaid and for those hereinafter set forth this plaintiff would

not have deposited and loaned any money to said Bank as it continued to do from time to time as hereinafter set forth, nor would it have allowed the same to remain therein, but on account of the false statements referred to aforesaid it allowed the same to remain on deposit, when but for said false and untrue statements it would have promptly withdrawn its loans and deposits before the failure of said Bank, and that it was prevented from so doing by reason of said false and untrue statements aforesaid showing said Bank to be in a good, sound financial condition and solvent, when in truth and in fact it was not in a good sound financial condition, but was wholly and utterly insolvent.

That on the 9th day of December, 1892, said Bank being insolvent as aforesaid, the defendants for the purpose of inducing the plaintiff and others to do and continue business with and to loan and deposit money with said Bank made (caused, allowed and permitted) a false statement of the condition of said Bank and its resources and liabilities which said statement is hereto attached and marked "Exhibit A", which said statement was made (caused, allowed and permitted to be made) by the said defendants (acting) as such directors and officers of said Bank for the purpose of deceiving the plaintiff and others and induce the plaintiff and others to do and continue doing business with said Bank as aforesaid and said defendants on said date caused (allowed and permitted) said false statements to be published in the newspapers of general circulation in Lincoln, Nebraska, and which said papers were of general circulation in the State of Nebraska (and said defendants on or about said date sent and caused to be sent to and received by plaintiff said false and untrue statements aforesaid.)

Plaintiff avers that on the 28th day of December, 1892, 10 the said defendants and each of them (acting) as such directors and officers of said Bank, for the purpose of deceiving the plaintiff and others and for the purpose of inducing the plaintiff and others to believe said Bank sound, solid, and solvent, and to induce the plaintiff and others to do business with said Bank as aforesaid made, (caused, allowed, and permitted to be made) a false statement of its resources and liabilities, a copy of which statement is hereto attached, and marked "Exhibit B", and caused (allowed and permitted) said statement to be published in various newspapers in general circulation in the City of Lincoln, Nebraska, which said newspapers were of general circulation in the State of Nebraska (and sent and caused to be sent to and received by the plaintiff said false and untrue statements aforesaid) for the purpose and with the intent to induce this plaintiff (and others) to loan money and deposit money with said Bank, when in truth and in fact said Bank was not in a sound, solid safe, and solvent condition but was wholly insolvent.

This plaintiff avers that on and between January 3rd, 1893, and January 21st 1893, the defendants with the fraudulent intent and purpose as aforesaid, during all of said time made, (allowed, caused, and permitted to be made) at divers intervals false statements of the condition of said Bank as to its resources and liabilities with the

intent and purpose of deceiving the plaintiff and others as aforesaid and caused (acquiesced in, allowed and permitted) said false statements, and each of them severally to be published in newspapers of general circulation in the City of Lincoln, Nebraska, which said papers aforesaid were of general circulation in the State of Nebraska, (and sent and caused to be sent to and received by the plaintiff said false statements aforesaid, through the United States mails and otherwise and which were received by plaintiff.)

And plaintiff avers that said statements and each of them showed, and the defendants in each of said statements, and by said statements represented that said Bank was in a thoroughly sound, safe and solvent condition, and was doing a prosperous business and was in all respects a safe and secure institution with which to do business and a safe Bank in which to make deposits and loans of money, and said statements were prepared and published, (and were caused, permitted and allowed to be prepared and published and sent and delivered to plaintiff) by said defendants for the purpose of making it appear to this plaintiff and others that said Bank was sound, safe, and solvent and thereby inducing this plaintiff and others to believe and rely on said statements as aforesaid; that said statements and each of them as made and published (and as sent and delivered to and received by plaintiff) stating the resources and liabilities of said Bank as aforesaid, were read and looked over by the officers of the plaintiff corporation, which officers were in the full control and management of plaintiff's business and plaintiff avers that it believed them to be true and correct statements of the condition and resources of said Bank, and that during said period of time—the exact time of which plaintiff cannot at this time state, the said defendants had conversations with the officers of plaintiff as aforesaid at divers times and during the time when said published statements were made as aforesaid between July 23rd, 1884 and January 21st, 1890, in which said conversations said defendants represented said Bank as which they were directors (and acting directors), and officers was thoroughly safe and sound, and believing said published statements and advertisements (and said statements of its financial condition so sent and received by the plaintiff) as aforesaid and said verbal representations so made by said defendants to be true, and believing them to be true and relying upon the same, that said Bank was sound, safe and solvent and

doing a flourishing and prosperous business, as said published statements and advertisements (and other statements as aforesaid) showed, and as represented in said verbal statements, this plaintiff on the 3rd day of January, 1887, loaned to and deposited with said Bank, of which defendants were the directors (and acting directors), and officers a sum of money and continued to loan and deposit with said Bank and from said date from time to time large sums of money up to and including the 21st day of January, 1890, when said sum of money so loaned and deposited with said Bank turned as plaintiff during all of said period withdrew and returned to said Bank said divers sums of money, and plaintiff avers that on the 1st day of January, 1890, plaintiff had a balance to its

credit amounting to Three Thousand Nine Hundred Ninety-eight and 63/100 (\$3,998.63) Dollars, money it had loaned to and deposited with said Bank and that from January 1st, 1893 to and including January 21st, 1893, the day said Bank closed its doors and ceased to do business, the plaintiff loaned and deposited with said Bank the following additional sums of money, to-wit:—

January 3rd, 1893.....	3,806.60
“ 5th, “	2,310.60
“ 12 “	1,079.21
“ 14 “	254.00
“ 16, “	909.50
“ 18, “	1,100.74
“ 19, “	810.60
Balance due plaintiff January 1st, 1893.....	3,998.63

Making total amount due plaintiff from Capital
National Bank\$14,810.96

That on sundry dates between January 1st, 1893 and January 21st, 1893, plaintiff withdrew from said Bank \$7,313.79, leaving still due and owing from said Capital National Bank to the plaintiff the sum of \$7,497.17, which said sum now remains due plaintiff and wholly unpaid, except as hereinafter stated.

13 Plaintiff avers that said statements (so sent and received by plaintiff as aforesaid) and advertisements (and statements) so published as aforesaid and said statements as verbally announced to the officers of said plaintiff, were, as the defendants and each of them well knew, and were in duty bound to know grossly exaggerated and wholly false and untrue, and that the liabilities of said Bank were in each of said statements and advertisements grossly misstated and the resources inflated and exaggerated as hereinbefore stated.

That whereas said statements and advertisements and each of them, as well as said verbal statements made and caused, allowed, and permitted to be made and said statements so sent to and received by plaintiff to the officers of plaintiff as aforesaid, showed that said Bank was sound, solid and solvent, and doing a flourishing business when in truth and in fact said Bank was not doing a flourishing and prosperous business, and was in fact at the time said statements (so sent to and received by plaintiff) and advertisements were published and verbally made, in an unsafe, precarious and insolvent condition, and at the time of the last published statement as aforesaid, and for a long time prior thereto, was in fact insolvent and could not pay the money owing plaintiff and others.

That the true condition of said Bank was well known to said defendants at the several times they made said statements and advertisements (and sent to and caused to be received by plaintiff said false and untrue statements) as published and as verbally made to the officers of plaintiff, but notwithstanding they knew its unsafe and insolvent condition and had full access to its books and accounts and were in a position to know, and it was their duty to know the true condition of said Bank, and they and each of them

14 should and could have known its true condition by the exercise of ordinary care in the discharge of their duties as directors and acting as directors and they each of them willfully, negligently, and recklessly for the purpose and with the intent aforesaid, made, caused, allowed, and permitted to be made, and published said false statements and advertisements (by said statements so sent to and received by plaintiff), and verbal false statements as hereinbefore set forth for the purpose of inducing the plaintiff and others to do business with and make loans to and deposit money in said Bank.

Plaintiff further avers that its knowledge of the condition of said Bank was wholly derived from said published statements (and said statements so sent and received by plaintiff) and advertisement, and by said verbal statements so made to its officers by said defendants, and that had said statements and advertisement so published and as verbally made as aforesaid set out and given the true condition of said Bank, it would have appeared, and it would have been shown that said Bank was not sound, solid and solvent, and that it was not a safe institution in which to do business, and the plaintiff would not have made said loans and deposits with said Bank.

Plaintiff avers that after making said loans and deposits with said Bank, which were each and all made by plaintiff relying upon said statements and advertisements as aforesaid, to-wit: on the 21st day of January, 1893, said Bank suspended business and went into the hands of a Receiver, and that said Bank then was, and had been for many years prior thereto and at the time of publishing said statements and advertisements (and sending to and causing to be received by plaintiff said statements) and making said verbal statements by said defendants to the officers of plaintiff as aforesaid

15 insolvent and unable to meet its obligations, and could not pay its debts, and did not have the assets and resources that said defendants represented it had in said statements, advertisements, and verbal statements made as aforesaid, and that by reason thereof said Bank could not pay and did not pay this plaintiff any part of said sum of money loaned and deposited with said Bank, except the sum of \$1,124.58, and that the remainder of said money so loaned and deposited with said Bank has been wholly lost to this plaintiff by reason of the facts hereinbefore set forth. Plaintiff states that by reason of the facts as above set forth and the false and fraudulent statements, advertisements, and representations of the defendants the plaintiff has been damaged, in the sum of Eleven Thousand (\$11,000.00) Dollars.

Wherefore plaintiff prays judgment against the defendants and each of them for the sum of Eleven Thousand (\$11,000.00) Dollars, its damages with interest thereon from January 21st, 1893, at 7 per cent. and costs of suit.

UTICA BANK, *Plaintiff*,
By BURR & BURR,
GEO. LOWLEY,
BIGGS & THOMAS,
Its Attorneys.

* * * * *

16

"EXHIBIT A."

Report of the Condition of the Capital National Bank at Lincoln, in the State of Nebraska, at the Close of Business December 9, 1892.

Resources.

Loans and discounts.....	768,601.44
Overdrafts secured and unsecured.....	6,217.74
United States Bonds to secure circulation.....	50,000.00
Stocks, securities, etc.....	325.00
Due from approved reserve agents.....	107,090.01
Due from other National Banks.....	17,800.33
Due from State Banks and Bankers.....	5,394.72
Banking house, furniture and fixtures.....	5,770.00
Other real estate and mortgages owned.....	38,716.92
Current expenses and taxes paid.....	14,286.28
Checks and other cash items.....	3,698.56
Exchange for clearing house.....	8,841.16
Bills of other banks.....	2,355.00
Fractional paper currency, nickels and cents.....	298.71
Specie.....	26,789.50
Legal tender notes.....	17,431.00
Redemption fund with United States Treasurer (5 per cent of circulation).....	1,350.00
Total.....	\$1,074,867.37

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Liabilities.

Capital Stock paid in.....	300,000.00
Surplus fund.....	6,000.00
Undivided profits.....	21,180.75
National Bank notes outstanding.....	45,000.00
Individual deposits subject to check.. \$356,139.33	
Demand certificates of deposit..... 158,545.14	
Due to other National Banks..... 81,574.14	
Due to State Banks and Bankers..... 47,372.89	
	<hr/>
	643,632.24
Notes and bills rediscounted.....	59,054.38
Total.....	\$1,074,867.37

STATE OF NEBRASKA,

County of Lancaster, ss:

I, R. C. Outcalt, Cashier of the above named Bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

R. C. OUTCALT, *Cashier.*

Subscribed and sworn to before me this 15th day of December, 1892.

HAL C. YOUNG,
Notary Public.

Correct—attest:

C. W. MOSHER,
C. E. YATES,
R. O. PHILLIPS,

Directors.

“EXHIBIT B.”

Report of the Condition of the Capital National Bank at Lincoln, in the State of Nebraska, at the Close of Business December 28th, 1886.

Resources.

	Loans and discounts.....	737,462.12
18	Overdrafts	3,974.33
	U. S. Bonds to secure circulation.....	50,000.00
	Other stock, bonds and mortgages.....	22,739.34
	Due from approved reserve agents.....	74,068.63
	Due from other National Banks.....	56,215.29
	Due from State Banks and Bankers.....	10,495.36
	Real estate, furniture and fixtures.....	7,177.33
	Current expenses and taxes paid.....	8,885.65
	Premiums paid	7,188.43
	Checks and other cash items.....	13,742.02
	Bills of other Banks.....	3,712.00
	Fractional paper currency, nickels and cents.....	216.42
	Specie	27,308.00
	Legal tender notes	10,400.00
	Redemption with U. S. Treasurer (5% circulation).....	1,900.00
	Total.....	\$1,035,448.92

Liabilities.

	Capital stock paid in.....	300,000.00
	Surplus funds	12,000.00
	Undivided profits	28,439.38
	National Bank notes outstanding.....	45,000.00
	Individual deposits subject to check... \$414,932.35	
	Demand certificates of deposit..... 40,859.66	
	Due to other national banks..... 107,648.27	
	Due to State Banks and Bankers..... 37,448.66	
		597,918.94
	Notes and Bills rediscounted.....	52,090.60
	Total.....	\$1,035,448.92

STATE OF NEBRASKA,
Lancaster County, ss:

19 I, C. W. Mosher, President of the above bank do solemn
swear that the above statement is true to the best of
knowledge and belief.

C. W. MOSHER, *President.*

Subscribed in my presence and sworn to before me this 11
day of October, 1886.

E. R. SMITH, N. P.

Correct—attest:

C. W. MOSHER,
C. E. YATES,
D. E. THOMPSON,
Directors.

* * * * *

20 In the District Court of Seward County, Nebraska.

UTICA BANK

vs.

CHARLES W. MOSHER et al.

Separate Answer of Charles E. Yates and Ellis P. Hamer to Plaintiff's Petition as Amended by Interlineation March 16, 1899.

21 Now come the defendants Charles E. Yates and Ellis
Hamer, and in obedience to the order of the court, each
makes answer for himself separately to the plaintiff's petition
as amended by interlineation on the 16th of March 1899.

These defendants say that whether the plaintiff made the deposits in the Capital National Bank of Lincoln at the times and the amounts stated in said amended petition, these defendants have no knowledge or information, and they therefore deny that such deposits were made.

First Defense.

These defendants each for himself alleges that the Capital National Bank of Lincoln, referred to in said amended petition was organized and had its existence under and by virtue of the national banking act passed and approved by the congress of the United States. That Homan J. Walsh was the vice-president of said bank and Richard C. Outcalt was the cashier of said bank, and that each of the other defendants was a director of said bank. That said bank was closed by the national bank examiner on or about the 23rd day of January 1893, and that soon after said date a receiver was duly appointed by the comptroller of the Currency to take charge of said bank and wind up its affairs, collect its assets and distribute the proceeds to the creditors and stockholders; and said bank has been in the hands and control of a receiver ever since said appointment.

That no forfeiture of the franchises of the said banking association has even been declared by the Comptroller of the Currency or adjudged by any court, for reason of the violation of any of the provisions of the national banking act by the directors and officers of said bank, or for any other reason.

That the duties and obligations of the directors of said bank were such and only such as were required by the national banking act under which said Bank was organized and existing.

22 These defendants deny that they signed or attested the reports set out and referred to in the said amended petition, and deny that they made, signed or attested any report purporting to show the condition of said bank for the purposes and in the manner alleged in the plaintiff's said amended petition.

These defendants further say that the cause of action set out in the plaintiff's amended petition, if it have any, is founded upon alleged facts, which, if true, constituted a violation by these defendants as directors, of their duties as such directors as laid down and defined in the national banking laws of the United States above referred to, concerning the government and management of national banks. And these defendants alleged that if any liability attaches to them or either of them as directors of said bank for any act done or duty neglected as set forth in the said amended petition or otherwise, that such liability is determined and controlled by the national banking act concerning the management of national banks; and that in determining the liability of these defendants or either of them, there is necessarily involved the construction of said national banking act relating to the duties of directors of national banks. That a Federal question is involved in determining the liability of these defendants by reason of the alleged mismanagement of said bank and the alleged neglect of duty on the part of these defendants.

These defendants further answering, each for himself, denies each and every allegation in the plaintiff's petition, except as hereinbefore stated or admitted.

Second Defense.

These defendants further say, each for himself, that the plaintiff on or about the 27th day of October, 1893, brought an action against these same defendants in the District Court of Lancaster County,

23 Nebraska, on the same cause of action as now set out in the plaintiff's amended petition, and that a removal of said cause of action from the Lancaster County District Court to the United States Circuit Court for the District of Nebraska was duly made, and after the filing of said cause of action in the said United States Court on removal, a motion was duly made by the plaintiff, the Utica Bank, to remand said cause to the District Court from which it had been removed, and which motion was overruled. And this plaintiff on its own motion dismissed said cause of action and a judgment for costs was rendered in said court against the plaintiff and in favor of these defendants in the sum of \$125.93 and the plaintiff has failed and neglected to pay the said judgment for costs.

That said judgment is in full force and effect and remains unsatisfied.

These defendants therefore aver that the plaintiff under the law and the practice is and ought to be barred and estopped from prosecuting these defendants on this claim, on account of its failure to pay said judgment for costs. That this litigation is vexatious and an abuse of the process of this court, and this action should be dismissed out of court.

Third Defense.

As a further defense to the plaintiff's pretended cause of action as set forth in its petition as now amended, these defendants say, each for himself, that said cause of action now pending was commenced in the District Court of Seward County, Nebraska, on or about the 25th day of February, 1895, by said plaintiff, making Charles W. Mosher, Homan J. Walsh, Charles E. Yates, Ellis P. Hamer, Ambrose P. S. Stuart, Richard C. Outcalt, and Rollo O. Phillips, defendants. That on or about the 9th day of July, 1895, the said plaintiff took judgment in this action against the defendant Ambrose P. S. Stuart, for the full amount of his claim as made against all of the defendants, the plaintiff's cause of action
24 being a joint and several claim against each and all of the defendants. That said judgment so rendered in the District Court of Seward County in favor of the plaintiff, Utica Bank and against the said defendant Stuart has not been reversed or set aside but in due course of time executions were issued on said judgment for the collection of the same, and levies were duly made upon the property belonging to the said defendant Stuart and said property was sold in satisfaction of the said judgment rendered in favor of the plaintiff.

And these defendants allege the fact to be that the plaintiff's claim against these defendants so ripened into judgment has been fully paid and satisfied and the judgment should be discharged of record if it has not already been so discharged. and that said judgment so taken by the said Utica Bank against the said defendant Stuart and the payment thereof is a complete bar against any further judgment or claim in favor of the said plaintiff against these defendants.

Fourth Defense.

These defendants for a further and separate defense to the plaintiff's cause of action, say that as hereinbefore alleged in the first defense in this answer, these defendants in all of their actions concerning and in connection with the said bank acted in their capacity as directors of said national bank, and if they neglected any duty as such directors or committed any of the wrongs complained of in the plaintiff's amended petition, whereby the said bank became insolvent and gave rise to a cause of action against these defendants sounding in damages, said cause of action existed, if any, in favor of the said bank or the receiver of said bank after his appointment and not in favor of this plaintiff.

These defendant allege the fact to be that if the plaintiff deposited his money in the said bank as alleged and the Bank then failed and became insolvent the plaintiff could not individually recover the said money from the said bank, and that the
 25 said money as well as any damages caused by the alleged neglect of duty on the part of these defendants, did not give rise to any cause of action in favor of this plaintiff; but allege the fact to be that if such damages resulted from the conduct or neglect of duty on the part of these defendants, a judgment therefor under the law could only be recovered by the said bank in its corporate capacity or by the receiver of said bank; and such damages when recovered, would under the law be distributed ratably by the said bank or by the receiver of said bank, among the creditors and stockholders of said Bank.

These defendants, each for himself, denies all alleged misconduct and mismanagement of said bank on his part, and all of the alleged neglect of duty and the causing of the insolvency of said bank as charged in the said amended petition.

These defendants therefore allege that the plaintiff has no cause of action against these defendants or either of them.

Wherefore, the defendants pray judgment for costs.

J. W. DEWEESE,
 F. M. HALL, AND
 FRANK E. BISHOP,
Att'ys for Def'ts.

* * * * *

26 In the District Court of Seward County, Nebraska.

BANK OF UTICA, Plaintiff,
 vs.
 CHARLES W. MOSHER et al., Defendants.

Reply to the Separate Answers of Charles E. Yates, Ellis P. Hamer, Charles W. Mosher, and Richard C. Outcalt.

And now comes the plaintiff and for its reply to each of the separate answers of Charles E. Yates, Ellis P. Hamer, Charles W. Mosher, and Richard C. Outcalt, and denies each and every allegation of new matter contained in their several answers.

BANK OF UTICA,
 By R. S. NORVAL,
 GEO. W. LOWLEY,
 J. J. THOMAS &
 L. C. BURR.

* * * * *

27 *Stipulation.*

The parties to this stipulation in each of the above entitled causes which are now pending in the district court of Seward
 28 County, Nebraska, hereby stipulate and agree that all of said causes shal be tried in the District Court at one and the

same time and that the evidence proper and applicable in any one case, or to any of the parties to this stipulation, whether plaintiff or defendant, subject of course to the objections of either of the parties to this stipulation and governed by the rulings of the Court, shall be offered and procured and the cases respectively disposed of by the Court and jury, unless another trial is granted by the Court.

It is further agreed and stipulated that separate verdicts and judgments shall be rendered in each case, and the same evidence, in-so-far as it may be pertinent and competent to any one of said cases or to any of the parties thereto, and being parties to this stipulation, shall be considered by the jury in such case in the disposition thereof; such evidence being properly applied to any one or to all of the parties to this stipulation as the facts and the rulings of the court may warrant.

This stipulation is made in view of the fact that evidence may be produced that is competent and proper in one or more of said cases or applicable to one or more of the parties in said cases signing this stipulation, and may not be competent or proper in other of said cases, or applicable to some of the parties in said cases, and it is agreed that the evidence that is competent or proper in any one case and for or against any one of the parties represented in this stipulation in such case may be received, and that then the whole evidence as thus introduced shall be properly applied to each respective case and to each respective party thereto under the rulings and directions of the Court, subject to the objections of either party.

It is further agreed that if either party or any party to any of said causes represented in this stipulation shall desire to prosecute error from the judgment of the District Court in any or in all of
29-32 said cases, a transcript of the testimony given on the trial of all of said cases shall be used on the proceedings in error in any or all of said causes as the same may be desired, and that it will be necessary to settle but one bill of exceptions and which may be filed and used in any or all of said cases, in order to thus preserve the record and testimony of the trial of each and all of said cases.

And that the bill of exceptions settled in one case shall be the bill of exceptions in each and all of said cases.

In witness whereof the parties hereto have hereunto set their hands this May 10th, 1902.

R. S. NORVAL,

J. J. THOMAS,

Attorneys for Plaintiffs.

H. F. ROSE AND

J. W. DEWEESE,

Attorneys for D. E. Thompson.

J. W. DEWEESE,

Att'y for Defts Yates, Walsh Estate & Hamer Estate.

CHAS. O. WHEDON,

Attorney for Chas. W. Mosher and R. C. Outcalt.

* * * * *

33 In the District Court of Seward County, Nebraska.

UTICA BANK, Plaintiff,

vs.

CHARLES E. YATES, LOUISA P. HAMER, as Administratrix of the Estate of Ellis P. Hamer, et al., Defendants.

Request of Defendants for Special Findings.

The defendants Charles E. Yates, and Louisa P. Hamer as administratrix of the estate of Ellis P. Hamer, deceased, each separately and for each one alone, requests the Court to make and find the following special findings of fact and of law:

I.

34 That upon the facts stated in the petition and the testimony produced at the trial the plaintiff is not entitled to recover damages against the defendant Yates and that judgment be entered in his favor.

II.

That upon the facts stated in the petition and the testimony produced at the trial the plaintiff is not entitled to recover damages against the defendant Louisa P. Hamer as administratrix of the estate of Ellis P. Hamer, deceased, and that judgment be entered in his favor.

III.

That neither the defendant Charles E. Yates nor Ellis P. Hamer, the deceased, knowingly violated or knowingly permitted any of the officers, agents or servants of the Capital National Bank to violate any of the provisions of the national banking act under which said Bank operated.

IV.

That neither the defendant Charles E. Yates nor the deceased, Ellis P. Hamer, knowingly participated in or assented to any violation of any of the provisions of said national banking act by any of the officers, agents or servants of said Capital National Bank;

V.

That the defendants Charles E. Yates and the deceased, Ellis P. Hamer, neither one, made any oral statement or representation of the financial standing, worth or responsibility of said Bank or of any of its assets or liabilities to the plaintiff or to any officer or representative of the plaintiff, prior to its failure.

VI.

That the plaintiff was not induced or influenced by any parol or oral statement or representation of the defendant Yates or of the deceased Hamer either to deposit any money or property in or to permit the same to remain in said Capital National Bank prior to its failure.

VII.

35 That the deceased, Ellis P. Hamer, did not make or participate in making and did not sign or attest the report of the condition of the Capital National Bank to the Comptroller of the Currency of date December 28, 1886, and of date December 9, 1892, exhibits "A" and "B" attached to the petition, and his administrator would not be liable for any representations contained in either of said reports, which are the only ones sued upon and sufficiently alleged in the petition as a basis of recovery;

VIII.

That the defendant Charles E. Yates did not make or participate in making either of the reports of the condition of said bank to the Comptroller of the Currency, dated December 28, 1886, and December 9, 1892, nor any of the statements therein contained;

IX.

That the defendant Charles E. Yates in attesting said reports of date December 28, 1886, and December 9, 1892, did not, with actual knowledge thereof or intentionally make an untrue statement or representation of the assets or liabilities of said Capital National Bank, nor of any of the items of either its assets or liabilities;

X.

That neither the defendant Charles E. Yates nor the deceased, Ellis P. Hamer, with actual knowledge or intentionally made any untrue statement or representation of any or all of the assets of the Capital National Bank in any or all of the statements or reports made to the Comptroller of the Currency and published by said Bank as required by the national banking act, which reports are shown in the testimony in this case;

XI.

(a) That neither the defendant Charles E. Yates nor the deceased, Ellis P. Hamer, with actual personal knowledge or intentionally, made, published, or declared or permitted to be made, published or declared any untrue statement, report or representation of any or all of the assets or liabilities of the Capital National Bank referred to in the petition or shown in the testimony, (b) and that in attesting any of the reports of said Bank which were published by said association, each of said defendants

acted in good faith, honestly believing that said statements, reports and publications were true and without any knowledge or intention that any of said statements, reports and representations were untrue.

FRANK E. BISHOP,
For Defendants.
YATES AND HAMER,
As Adm'rs.

Afterwards, on the 1st day of April, A. D. 1911, there was filed herein certain Requests of Defendants Yates and Hamer for Additional Findings, in words and figures following to-wit:

In the District Court Seward County, Nebraska.

UTICA BANK, Plaintiff,
vs.
CHARLES E. YATES et al., Defendants.

Request of Defendants Yates and Hamer for Additional Special Findings.

The defendant Charles E. Yates requests the court to find as follows:

12. That he did not personally take any part in the preparation or distribution of the printed slips or business cards showing the assets and liabilities of the bank, as had been shown in the official reports to the comptroller and printed in the newspaper and the names of the directors of the bank.

13. That he did not know that said printed slips or business cards were prepared or distributed to the plaintiff.

The defendant Louisa P. Hamer, as administratrix, requests the court to find as follows:

15. That the evidence does not show that Ellis P. Hamer personally knew of the preparation or distribution of the printed slips or business cards showing the assets and liabilities of the bank, as had been shown in the official reports to the comptroller and printed in the newspapers and the names of the directors of the bank.

16. That the evidence does not show said Hamer personally took part in the preparation or distribution of said printed slips or business cards.

17. That the evidence does not show said E. P. Hamer knew that advertisements of the bank, showing its assets, liabilities and officers' names were printed and carried in the newspapers.

FRANK E. BISHOP,
Attorneys for Defendants Yates and Hamer.

* * * * *

41 And now on this 1st day of April, 1911, being a day of
the February 1911 term of this Court, these causes came on
further to be heard on the motion of each of the plaintiffs
42 & 43 for leave to amend their interlined amended petitions by
interlineation upon consideration whereof said motions and
each of them are sustained and the plaintiffs and each of them per-
mitted to amend their petitions as prayed; to which ruling of the
Court the defendants and each of them except.

* * * * *

44 In the District Court of Seward County, Nebraska.

THE UTICA BANK, Plaintiff,

vs.

CHARLES E. YATES, LOUISA P. HAMER, as Administratrix of the
Estate of Ellis P. Hamer et al., Defendants.

Special Findings of Fact and Conclusions of Law.

And now on this first day of April, 1911, the Court in pursuance of the requests of Charles E. Yates and Louisa P. Hamer, administratrix, defendants in this cause, makes the following findings of fact and conclusions of law:

Respecting the first request the Court finds the conclusions of law in favor of the plaintiff and against the defendant Yates.

Respecting the second request the Court finds the conclusions of law in favor of the plaintiff and against the defendant Hamer.

Respecting the third request the Court finds against each of the defendants and in favor of the plaintiff.

Respecting the fourth request the court finds against each of the defendants and in favor of the plaintiff.

Respecting the fifth and sixth requests the Court finds the
45 facts in favor of the defendants as to each request.

Respecting the seventh request the Court finds that the deceased Hamer did not attest the reports of December 28, 1886 and December 9, 1892.

Respecting the eighth request the Court finds as a matter of fact that the defendant Yates did attest the reports of the Capital National Bank made to the Comptroller of date December 28, 1886 and December 9, 1892.

Respecting the ninth request, as to the report of December 28, 1886 the Court answers the same in the negative and as to the report of December 9, 1892 the Court answers the question in the affirmative.

Respecting the tenth request the Court finds in the affirmative.

Respecting the eleventh request the Court finds that the same contains two interrogatories, sub-division "A" ending with the word "testimony" in the sixth line, and the residue thereof contained in sub-division "B", and answers the first question contained in sub-division "A" in the affirmative and the second question contained in sub-division "B" in the negative.

Subject to the foregoing Special Findings of fact made at the request of the defendants the Court now finds generally in plaintiff's favor and gainst the defendants and each of them upon the evidence under the issues joined and that the allegations of plaintiff's amended petition are true, and that plaintiffs *are* entitled to recover in an action of deceit under the principles of the common law exclusive of the requirements of the national banking act. The Court further finds that the plaintiff has sustained damages in the sum of \$11,737.00.

To each of the findings of fact and conclusions of law 46-53 made by the Court the defendants each severally except.

B. F. GOOD, *Judge.*

* * * * *

54 Comes now the plaintiff and moves the Court to amend
its last petition filed herein in this to-wit: that it be per-
55 mitted to amend its petition as follows, to-wit:

On page 2, line 36, after the words "to be" add the words "printed and".

On page 2, line 52, after the word "plaintiff" add the words "and sent by defendants and their agents to plaintiff through the United States Mails and otherwise."

On page 2, line 59, after the word "advertisements" add the words "and the statements sent by defendants to plaintiff as aforesaid".

On page 2, line 61, after the word, "advertisements" add the words "and the statements made by the defendants to the plaintiff as aforesaid".

On page 3, line 71, after the word "public" add the words "and sent and delivered to plaintiff statements of its condition".

On page 3, line 73, after the word "published" add the words "and sent and given to plaintiff".

On page 3, line 88, after the word "newspapers" add the words "and as aforesaid caused and permitted to be made and sent and delivered to plaintiff statements of the bank's condition".

On page 3, line 91, after the word "statements" add the words "and on the statements of its financial condition sent to and received by plaintiff as aforesaid".

On page 4, line 116, after the word "Nebraska" add the words "and said defendants on or about said date sent and caused to be sent to and received by plaintiff said false and untrue statements as aforesaid".

On page 4, line 126, after the word "Nebraska" add the words "and sent and caused to be sent to and received by the plaintiff said false and untrue statements as aforesaid".

56 On page 5, line 138, after the word "Nebraska" add the words "and sent and caused to be sent to and received by the plaintiff said false statements as aforesaid through the United States Mails and otherwise, and which were received by plaintiff".

On page 5, line 145, after the word "published" where it appears the second time add the words "and sent and delivered to plaintiff".

On page 5, line 149, after the word "published" add the words "and as sent and delivered to and received by plaintiff".

On page 5, line 162, after the word "advertisements" add the words "and said statements of its financial condition so sent and received by the plaintiff".

On page 5, line 166, after the word "advertisements" add the words "and other statements as aforesaid".

On page 5, line 165, before the word "this" insert the following words "and statements sent to plaintiff by defendants and by plaintiff received and examined".

On page 6, line 194, after the word "statements" insert the following words "so sent to and received by plaintiff as aforesaid", and after the word "advertisements" add the words "and statements".

On page 6, line 202, after the word "made" the second time add the words "and said statements so sent to and received by plaintiff".

On page 6, line 206, after the word "statements" add the words "so sent to and received by plaintiff".

On page 7, line 212, after the word "advertisements" add the words "and sent to and caused to be received by plaintiff said false and untrue statements".

On page 7, line 220, after the word "advertisements" add the words "by said statements so sent to and received by plaintiff".

On page 7, line 224, after the word "statements" add the words "and said statements so sent to and received by plaintiff".

On page 7, line 238, after the word "advertisements" add the words "and sending to and causing to be received by plaintiff said Statements".

On page 7, at the end of line 241, strike out and omit the word "published".

THE UTICA BANK,
Plaintiff,

By NORVAL BROS. &
J. J. THOMAS,
Its Attorneys.

* * * * *

The defendant Charles E. Yates moves the court to set aside his findings and grant a new trial for these reasons:

1. The last amended petition does not state facts sufficient for a cause of action against this defendant nor any right to recover against this defendant.

2. The findings and judgment against this defendant are contrary to law and are not supported by evidence sufficient to sustain them.

3. For errors of law occurring at the trial to which the defendant excepted.

4. The court erred in finding the defendant liable on either of the reports of December 28, 1886, and of December 9, 1892, and the evidence is insufficient to sustain a judgment against the defendant on either of said reports.

5. The court erred in admitting in evidence and in finding liability on the reports other than those of December 28, 1886, and December 9, 1892, which former reports were not sufficiently pleaded

and the evidence on them is not sufficient to sustain the findings and judgment against the defendant.

6. The court erred in his finding against the defendant on the first request, which is not supported by the evidence, and the defendant excepts to said finding.

7. The court erred in his finding against the defendant on the second request, which is not supported by the evidence, and this defendant excepts to said finding.

8. The court erred in his finding against the defendant on the third request which is not supported by the evidence, and the defendant excepts to said finding.

9. The court erred in finding on the third request that Charles E. Yates knowingly violated or knowingly permitted the officers, agents or servants of the bank to violate any of the provisions of the banking act and that the defendant is liable at the common law for deceit therefor.

10. The court erred in his finding against the defendant on the fourth request which is not supported by the evidence and the defendant excepts to said finding.

11. The court erred in finding on the fourth request that Charles E. Yates knowingly participated in or assented to the violation of any provisions of the banking act by any of the officers, agents or servants of the bank, and that the defendant is liable at
59 the common law for deceit therefor.

12. The court erred in refusing to find on the seventh request that Ellis P. Hamer did not make or participate in making the reports of December 28, 1886, and December 9, 1892, to which the defendant excepts.

13. The court erred in refusing to find on the eighth request that Charles E. Yates did not make or participate in making the reports of December 28, 1886, and December 9, 1892, to which the defendant excepts.

14. The court erred in his finding on sub-division B of the eleventh request that Charles E. Yates, in attesting the reports did not act in good faith, honestly believing said reports and statements were true, and knew and intended the same to be untrue, to which the defendant excepts.

15. The court erred in his finding on sub-division B of the eleventh request that Charles E. Yates attested any of the official reports of the bank in bad faith without honest belief that said reports were true and knowing and intending that the same were untrue, which finding is not supported by any evidence and is contrary to the law and the evidence.

16. The Court erred in his finding on sub-division B of the eleventh request that the defendant is liable at common law for deceit when if said finding were true the liability must be determined by the provisions of the National Banking Act and Section 5239 thereof, and the evidence does not sustain such a finding nor liability under said act.

17. The court erred in finding the allegations and issues of the amended petition in favor of the plaintiff, and the same are not sup-

ported by sufficient evidence to sustain recovery against the
60 defendant thereon.

18. The court erred in finding that the plaintiff is entitled to recover in an action of deceit under the common law exclusive of the requirements of the National Banking Act, said finding is not supported by sufficient allegations of fact nor by the evidence, and the conduct of the defendant shown by the evidence is entirely controlled by the provisions of said act and no liability is established thereunder.

19. All the acts and conduct of Charles E. Yates shown in the evidence are within, governed and authorized by the provisions of the National Banking Act and under and according to the terms and provisions of said act the defendant is not liable to the plaintiff in this action and the finding and judgment should be for the defendant thereon.

20. The court erred in finding that Charles E. Yates knew of or participated in the preparation or distribution or use of the printed slips or business cards of the bank or of the advertisements in the newspapers and in each of the findings Nos. 12, 13, and 14 and that defendant is liable therefor at common law for deceit. There is no evidence to support such finding and the preparation, distribution and use of said printed matter were all within and authorized by the National Banking Act and if any liability exists for the same against the defendant it is governed and limited by the provisions of said act and Section 5239 thereof and not at common law on an entirely different rule of law and measure of liability.

21. The court erred in holding the defendant liable for the preparation, distribution and publication of the printed slips and business cards of the bank, showing its assets, liabilities and officers' names and the newspaper advertisements, none of which was done
61 by, participated in or known of by this defendant or Ellis P.

Hamer nor for which they were responsible nor liable at the common law or otherwise under the National Banking Act, and in making each finding Nos. 12, 13, and 14.

21a. The court erred in finding against this defendant on point "A" of the eleventh request.

21b. The Court erred in finding against defendant on the 9th request as to report Dec. 9, 1892.

21c. The Court erred in finding against defendant on the tenth request.

22. The finding and judgment is not sustained by the special findings.

23. On the special findings by the Court, the plaintiff is not entitled to recover against the defendant on the cause of action in the petition and the defendant is not liable thereon and judgment should be entered in his favor.

24. The conclusion and judgment that the plaintiff in an individual capacity is entitled to recover for negligence or deceit on the principle of the common law for the defendant's negligent performance of his duty as a director of the Bank and for misfeasance and mismanagement in his official duties; are contrary to and violative of the provisions of the National Banking law and the plan of

liquidation and distribution of assets of insolvent National Banks in that all liabilities of Directors by said act for official neglect, misfeasance and mismanagement pass to the Receiver of such Bank to be enforced by him for ratable distribution and benefit of all creditors while the judgment and findings permit the plaintiff to recover personally to the exclusion of all other creditors which violates and nullifies the provisions of said act.

25. The Court erred in finding and adjudging the defendant liable on the cause of action in the petition and that the same is not governed and limited by the liabilities imposed upon Directors of National Banks by the National Banking act, being title 62 revised Statutes of United States and in adjudging that a common law action of deceit can be maintained against him for neglect of official duty under said act, or upon the manner in which he conducted or failed to conduct the business of the Bank upon grounds other than the liabilities imposed by said act.

26. The Court erred in finding and adjudging the defendant liable notwithstanding the defendant was without knowledge of the falsity of any report attested by him and with honest belief on information from the managing officers of the Bank that they were true upon the principles of the common law exclusive of said act and in violation of the provision of Section 5239 revised statute which makes liability depend upon the fact that directors knowingly violated or knowingly permitted the violation of the provisions of said act and knowingly and wilfully participated in and assented to such violation.

27. The findings and judgment are contrary to and violative of the decision of the Supreme Court of the United States upon a writ of error to the Supreme Court of Nebraska in proceedings by appeal from this Court in this identical case reported in volume 206 U. S. Supreme Court Reports Pages 158 to 181 inclusive and also of the judgment of said United States Supreme Court on said writ of error and the mandate of said Court on said judgment pursuant to which these further proceedings are had in the following particulars: (a) the findings and judgement violate the holding of said Supreme Court that section 5239 revised statutes of the United States furnished the exclusive test of liability in actions against Bank Directors for deceit based upon false official reports of the resources and liabilities of a National Bank. (b) They are violative of the holding of said Court that a Director of a National Bank is not charged with knowledge that a report attested by him is true or false as matter of law by reason of his official relation or upon the theory that "it was his duty to know or refrain from acting. (c) They are violative of the holding of said Court that liability of a Director of such Bank for deceit does not attach from the fact that a Director "merely, negligently participated in or assented to the making and publishing of an untrue official report." (d) They are violative of the holding of said Court "that where by law responsibility is made to arise from the violation of a statute knowingly, something more than negligence is required, that is, that the violation must in effect be intentional." And

in each and every of these respects the Court has denied that due faith and credit to the judgment of the Supreme Court of the United States required to be given it by the Constitution of the United States and the acts of Congress passed pursuant thereto and by the inherent necessity of according such faith and credit to all decisions of said Court in order to maintain the constitutional requirement that "this constitution and the laws of the United States which shall be made in pursuance thereto shall be the supreme law of the land and the judges in ever- state shall be bound thereby any-thing in the Constitution or laws of any state to the contrary notwithstanding," contained in section 2 article 6 of the constitution of the United States.

28. Upon the issues and the evidence, the defendant is entitled to judgment in his favor and moves the Court to render such judgment thereon.

29. Upon the facts specially found; this defendant is entitled to judgement in his favor as matter of law and moves the Court to render such judgement thereon notwithstanding his general
64 finding for the plaintiff.

30. The damages are excessive and not supported by the evidence.

31. The Court erred in allowing interest in this action for tort upon the principal amount.

32. The finding and judgement are against the clear weight of the evidence.

33. The court erred in finding on the ninth request in the affirmative as to the report of December 9, 1892.

34. The court erred in finding on the tenth request in the affirmative or that the defendant with actual knowledge or intentionally made any untrue statement of the financial condition of the bank in the reports made to the comptroller.

35. The Court erred in its first finding on its own motion that the bank never had any capital or surplus.

36. The court erred in its second finding on its own motion that either Ellis P. Hamer or defendant Yates had knowledge that advertisements, statements and representations, either official or unofficial were prepared and sent to the plaintiff or distributed either by their authority or otherwise.

37. The Court erred in its third finding on its own motion that either Ellis P. Hamer or the defendant Yates knew that statements or representations, either official or voluntary, were prepared, distributed or sent to the plaintiff which contained material false representations of the financial condition of the bank, or were in fact false and untrue, and the court erred in finding that either of them knowingly permitted, assented to or allowed such official or voluntary statements to be made, published advertised or sent to the plaintiff, and the court erred in finding that any of said official statements or advertisements were untrue, either with the knowl-
65 edge or permission of this defendant.

38. The court erred in its fourth finding on all the issues joined for the plaintiff and against the defendant and that the allegations of the amended petition were true.

39. This defendant excepts to each one severally of the findings of the court on the first requests made by this defendant on the requests made by defendant Thompson on the additional requests made by this defendant and on the findings by the court on its own motion.

The defendant hereby gives notice of appeal of this judgment to the Supreme Court of this State.

FRANK E. BISHOP,
For Defendants.

* * * * *

The defendant Louisa P. Hamer Adm'x moves the court to set aside her findings and grant a new trial for these reasons:

1. The last amended petition does not state facts sufficient
66 for a cause of action against this defendant nor any right to recover against this defendant.

2. The findings and judgment against this defendant are contrary to law and are not supported by evidence sufficient to sustain them.

3. For errors of law occurring at the trial to which the defendant excepted.

4. The court erred in finding the defendant liable on either of the reports of December 28, 1886, and of December 9, 1892, and the evidence is insufficient to sustain a judgment against the defendant on either of said reports.

5. The court erred in admitting in evidence and in finding liability on the reports other than those of December 28, 1886 and December 9, 1892, which former reports were not sufficiently pleaded and the evidence on them is not sufficient to sustain the findings and judgment against the defendant.

6. The court erred in his finding against the defendant on the first request, which is not supported by the evidence, and the defendant excepts to said finding.

7. The court erred in his finding against the defendant on the second request, which is not supported by the evidence and this defendant excepts to said finding.

8. The court erred in his finding against the defendant on the third request which is not supported by the evidence and the defendant excepts to said finding.

9. The court erred in finding on the third request that Ellis P. Hamer knowingly violated or knowingly permitted the officers, agents or servants of the bank to violate any of the provisions of the banking act and that the defendant is liable at the common law for deceit therefor.

67 10. The court erred in his finding against the defendant on the fourth request, which is not supported by the evidence and the defendant excepts to said finding.

11. The court erred in finding on the fourth request that Ellis P. Hamer knowingly participated in or assented to the violation of any provision of the banking act by any of the officers, agents or servants of the Bank and that the defendant is liable at the common law for deceit therefor.

12. The court erred in refusing to find on the seventh request that Ellis P. Hamer did not make or participate in making the reports of December 28, 1886 and December 9, 1892, to which the defendant excepts.

13. The court erred in refusing to find on the eighth request that Charles E. Yates did not make or participate in making the reports of December 28, 1886, and December 9, 1892, to which the defendant excepts.

14. The court erred in his finding on sub-division B of the eleventh request that Ellis P. Hamer, in attesting the reports, did not act in good faith, honestly believing said reports and statements were true, and knew and intended the same to be untrue, to which the defendant excepts.

15. The court erred in his finding on sub-division B of the eleventh request that Ellis P. Hamer attested any of the official reports of the bank in bad faith without honest belief that said reports were true and knowing and intending that the same were untrue, which finding is not supported by any evidence and is contrary to the law and the evidence.

16. The court erred in his finding on sub-division B of the eleventh request that the defendant is liable at common law for
68 deceit when if said finding were true the liability must be determined by the provisions of the National Banking Act and Section 5239 thereof, and the evidence does not sustain such a finding nor liability under said act.

17. The court erred in finding the allegations and issues of the amended petition in favor of the plaintiff and the same are not supported by sufficient evidence to sustain recovery against the defendant thereon.

18. The court erred in finding that the plaintiff is entitled to recover in an action of deceit under the common law exclusive of the requirements of the National Banking Act, said finding is not supported by sufficient allegations of fact nor by the evidence, and the conduct of the defendant shown by the evidence is entirely controlled by the provisions of said act and no liability is established thereunder.

19. All the acts and conduct of Ellis P. Hamer shown in the evidence are within, governed and authorized by the provisions of the National Banking Act and under and according to the terms and provisions of said act the defendant is not liable to the plaintiff in this action and the finding and judgment should be for the defendant thereon.

20. The court erred in finding that Ellis P. Hamer knew of or participated in the preparation or distribution or use of the printed slips or business cards of the bank or of the advertisements in the newspapers and each of the findings Nos. 15, 16, and 17 and that defendant is liable therefor at common law for deceit. There is no evidence to support such finding and the preparation, distribution and use of said printed matter were all within and authorized by the National Banking Act and if any liability exists for the same against the defendant it is governed and limited by the pro-

visions of said act and Section 5239 thereof and not at common law on an entirely different rule of law and measure of liability.

21. The court erred in holding the defendant liable for the preparation, distribution and publication of the printed slips and business cards of the bank, showing its assets, liabilities and officers' names and the newspaper advertisements, none of which was done by, participated in or known of by the defendant or Ellis P. Hamer nor for which they were responsible nor liable at the common law or otherwise under the National Banking Act, and in making each finding Nos. 15, 16, and 17.

21a. The court erred in finding against this defendant on point "A" of the eleventh request.

21b. The court erred in finding against defendant on the tenth request.

22. The finding and judgment is not sustained by the special findings.

23. On the special findings by the Court, the plaintiff is not entitled to recover against the defendant on the cause of action in the petition and the defendant is not liable thereon and judgment should be entered in his favor.

24. The conclusion and judgment that the plaintiff in an individual capacity is entitled to recover for negligence or deceit on the principle of the common law for the defendant's negligent performance of his duty as a director of the Bank and for misfeasance and mismanagement in his official duties, are contrary to and violative of the provisions of the National Banking law and the plan of liquidation and distribution of assets of insolvent National banks in that all liabilities of Directors by said act for official neglect misfeasance and mismanagement pass to the Receiver of such Bank to be enforced by him for ratable distribution and benefit of all creditors while the judgment and findings permit the plaintiff to recover personally to the exclusion of all other creditors which violates and nullifies the provisions of said act.

25. The Court erred in finding and adjudging the defendant liable on the cause of action in the petition and that the same is not governed and limited by the liabilities imposed upon Directors of National Banks by the National Banking act, being title 62 revised Statutes of the United States and in adjudging that a common law action of deceit can be maintained against him for neglect of official duty under said act, or upon the manner in which he conducted or failed to conduct the business of the Bank upon grounds other than the liabilities imposed by said act.

26. The Court erred in finding and adjudging the defendant liable notwithstanding the defendant was without knowledge of the falsity of any report attested by him and with honest belief on information from the managing officers of the Bank that they were true upon the principles of the common law exclusive of said act and in violation of the provision of section 5239 revised statute which makes liability depend upon the fact that directors knowingly

violated or knowingly permitted the violation of the provisions of said act and knowingly and willfully participated in and assented to such violation.

27. The findings and judgment are contrary to and violative of the decision of the Supreme Court of the United States upon a writ of error to the Supreme Court of Nebraska in proceedings by appeal from this Court in this identical case reported in volume 206 U. S. Supreme Court Reports Pages 158 to 181 inclusive and also of the judgment of said United States Supreme Court on said writ of error and the mandate of said Court on said judgment pursuant to which these further proceedings are had in

the following particulars (a) the findings and judgment violate the holding of said Supreme Court that section 5239 revised statutes of the United States furnished the exclusive test of liability in actions against Bank Directors for deceit based upon false official reports of the resources and liabilities of a National Bank. (b) They are violative of the holding of said Court that a Director of a National Bank is not charged with knowledge that a report attested by him is true or false as matter of law by reason of his official relation or upon the theory that "it was his duty to know or refrain from acting" (c) They are violative of the holding of said Court that liability of a Director of such Bank for deceit does not attach from the fact that a Director "merely, negligently participated in or assented to the making and publishing of an untrue official report." (d) They are violative of the holding of said Court that where by law responsibility is made to arise from the violation of a statute knowingly, something more than negligence is required, that is, that the violation must in effect be intentional." And in each and every of these respects the Court has denied that due faith and credit to the judgment of the Supreme Court of the United States required to be given it by the Constitution of the United States and the acts of Congress passed pursuant thereto and by the inherent necessity of according such faith and credit to all decisions of said Court in order to maintain the constitutional requirement that "this constitution and the laws of the United States which shall be made in pursuance thereto shall be the supreme law of the land and the judges in every state shall be bound thereby anything in the Constitution or laws of any state to the contrary notwithstanding," contained in section 2 article 6 of the constitution of the United States.

28. Upon the issues and the evidence, the defendant is entitled to judgment in his favor and moves the Court to render such judgment thereon.

29. Upon the facts specially found, this defendant is entitled to judgment in his favor as matter of law and moves the Court to render such judgment thereon notwithstanding his general finding for the plaintiff.

30. The damages are excessive and not supported by the evidence.

31. The Court erred in allowing interest in this action for tort upon the principal amount.

32. The finding and judgement are against the clear weight of the evidence.

33. The court erred in finding on the ninth request in the affirmative as to the report of December 9, 1892.

34. The court erred in finding on the tenth request in the affirmative or that the defendant with actual knowledge or intentionally made any untrue statement of the financial condition of the bank in the reports made to the comptroller.

35. The court erred in its first finding on its own motion that the bank never had any capital or surplus.

36. The court erred in its second finding on its own motion that either Ellis P. Hamer or defendant Yates had knowledge that advertisements, statements and representations, either official or unofficial, were prepared and sent to the plaintiff or distributed either by their authority or otherwise.

37. The court erred in its third finding on its own motion that either Ellis P. Hamer or the defendant Yates knew that statements or representations, either official or voluntary, were prepared, distributed or sent to the plaintiffs which contained material false representations of the financial condition of the bank, or were in fact false and untrue, and the court erred in finding that either of them knowingly permitted, assented to or allowed such official or

73 voluntary statements to be made, published, advertised or sent to the plaintiff, and the court erred in finding that any of said official statements or advertisements were untrue, either with the knowledge or permission of this defendant.

38. The court erred in its fourth finding on all the issues joined for the plaintiff and against the defendant and that the allegations of the amended petition were true.

39. This defendant excepts to each one severally of the findings of the court on the first requests made by this defendant on the requests made by defendant Thompson on the additional requests made by this defendant and on the findings by the court on its own motion.

The defendant hereby gives notice of appeal of this judgment to the Supreme Court of this state.

FRANK E. BISHOP,

For Defendants.

* * * * *

And now on this 8th day of May, 1911, it being the first day of the May 1911 term, of this Court, this cause came on to be heard on the request of the defendants, for additional special findings

74 filed herein, April 1st, 1911, and for final determination and the Court being fully advised in the premises in response to the request of the defendants, Charles E. Yates and Louisa P. Hamer, makes the following additional special findings of fact and conclusions of law:

Respecting the 12th request for additional finding the Court finds that the defendant, Charles E. Yates, did not personally take part in the preparation or distribution of the printed slips or business

cards showing the assets and liabilities of the bank, as shown in the evidence, but the Court finds that the defendant Yates, knew that such printed slips and business cards were compiled, prepared and distributed by the bank, from time to time and contained his name as one of the directors thereof, and purported and assumed to be compiled, prepared and distributed under the authority and directions of said defendant Yates, and in his name as one of the directors of the bank.

Respecting the request numbered 13, the Court finds that the defendant Charles E. Yates, did not know that such printed slips and business cards in the name of the Directors including the said Charles E. Yates, were prepared and distributed to the customers, patrons and depositors of the Capital National Bank.

Respecting the 14th request, the Court finds against the defendant Yates.

Respecting the 15th request the Court finds that the said Ellis P. Hamer, did know that said printed slips and business cards, in the name of the Directors including the said Ellis P. Hamer, were prepared, and distributed to the customers, patrons and depositors of the Capital National Bank.

Respecting the 16th request the Court finds that the said Ellis P. Hamer, did not personally take part in the preparation or distribution of the printed slips or business cards, showing the
 75 assets and liabilities of the bank, as shown in the evidence but the Court finds that he did know that such printed slips and business cards were prepared and distributed by the bank, from time to time and contained his name as one of the directors thereof, and purported and assumed to be prepared and distributed under the authority and directions of said Ellis P. Hamer, and in his name as one of the directors of the bank.

Respecting the 17th request the Court finds against the said Hamer.

The Court further and upon its own motion finds as to each and all of the defendants, in this action that,—The Capital National Bank, at the time it assumed that name and at the time it increased its capital stock to \$300,000 had sustained losses greatly in excess of its purported capital stock, and that it never, in fact had any capital stock, undivided profits, or surplus and that it was at all times insolvent and so continued up to the time it ceased to do business, on January 21, 1893, at which time, its liabilities exceeded its assets by more than a million dollars.

The Court finds that from and after September 1891, the said Ellis P. Hamer, and the defendants Yates and Thompson, and each of them had knowledge and knew that the statements, advertisements, and representations of the bank's financial condition and capital stock, both official and unofficial and voluntary shown by the evidence were being published in the newspapers and sent to the plaintiff, by the officers of the Bank, as alleged in the amended petition and that they contained the names of all the directors including said Ellis P. Hamer, and the defendants Yates and Thomp

son, and purported to be made and published under and by their authority in their names and with their sanction and consent.

The Court further finds that the said Ellis P. Hamer, 76-91 and the defendants, Yates and Thompson, each of them, from and after September 1891, had knowledge and knew said statements, representations and advertisements aforesaid, contained material false representations of the financial condition of said bank, and were in fact false and untrue, as in Plaintiff's amended petition alleged and with knowledge of all of the matters and facts aforesaid they and each of them, knowingly permitted, assented to and allowed the same to be made, published, advertised, and sent to plaintiff, as aforesaid as in the amended petition alleged. That said statements and advertisements aforesaid showed and represented the Bank to be in a sound solvent and prosperous financial condition, when in fact it was at all times wholly insolvent and unable to pay its liabilities.

The Court further finds on all the issues joined for the plaintiff and against the defendants and each of them and that the allegations of plaintiff's amended petition are true.

To all of which findings the defendants and each of them severally except.

It is therefore ordered and adjudged by the Court that the plaintiff have and recover from the defendants and each of them the sum of \$11737.00 *Dollars*, with seven (7) per cent interest thereon from April 1st, 1911, and costs of action taxed at — *Dollars*.

And thereupon and on the same day, this cause came on further to be heard on the motions of the defendants for new trial and the Court being fully advised in the premises doth overrule the same to which the defendants and each of them except and are allowed Forty (40) days from the rising of the Court within which to prepare and serve bill of exceptions.

* * * * *

92 And afterwards, to-wit, on the 31st day of January, 1913, there was rendered by said court and entered of record upon the journal thereof a certain Judgment in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1913, Jan 31.

No. 17278.

UTICA BANK, Appellee,

v.

CHARLES E. YATES et al., Appellants.

Appeal from the District Court of Seward County

This cause coming on to be heard upon appeal from the district court of Seward county, was argued by counsel and submitted to

the court; upon due consideration whereof, the court doth find error apparent in the record of the proceedings and judgment of said district court; it is, therefore, considered, ordered and adjudged that said judgment of the district court be, and the same
 93 hereby is, reversed and the action dismissed; that appellants pay all costs incurred herein by them, taxed at \$ —, and have and recover from appellee all their costs so expended; that appellee pay all costs incurred herein by it, taxed at \$ —, for all of which execution is hereby awarded, and that a mandate issue accordingly.

J. FAWCETT,
Acting Chief Justice.

* * * * *

94

JONES NATIONAL BANK

v.

YATES.

BANK OF STAPLEHURST

v.

YATES.

UTICA BANK

v.

YATES.

BAILEY,

v.

YATES.

Nos. 17276-7-8-9.

Opinion filed Jan. 31, 1913.

1. The national bank act as provided in section 5239 of the Revised Statutes of the United States affords the exclusive rule by which to measure the right to recover damages from directors based upon a loss resulting solely from their violation of a duty expressly imposed upon them by a provision of the act, and that liability can not be measured by a higher standard than that which is imposed by the act.

2. Where by the federal statute concerning national banks a responsibility is made to arise against the directors from its violation knowingly, proof of something more than negligence is required and it must be shown that the violation was intentional.

3. Where the directors of a failed national bank claim immunity under section 5239 of the Revised Statutes of the United States as to the rule of liability to be applied to them, the state courts may not create another rule than that provided by the national bank act, nor are they at liberty to disregard the rule provided by the act.

4. If there is a penalty or liability enforced because of the violation or disregard of the United States statute, then the penalty is that provided by such statute, and the interpretation of the statute made by the United States supreme court must be adopted by the state courts.

5. The civil liability of national bank directors in respect to the making and publishing of the official reports of the condition of the bank is based upon the duty enjoined by the national bank act, and the rule expressed by the statute is the exclusive rule because of the elementary principle that where a statute creates a duty and prescribes a penalty for its performance "the rule prescribed in the statute is the exclusive test of liability." *Yates v. Jones Nat. Bank*, 206 U. S. 158; *Farmers & Merchants Nat. Bank v. Dearing*, 91 U. S. 29.

6. To render a director of a national bank personally liable to a depositor for fraud and deceit practiced by its officers, as at common law, it must be alleged and proven that the director had knowledge of, or approved of, or participated in, the fraudulent acts of which complaint is made.

96 HÄMER, J.:

The cases designated by the foregoing titles and numbers are before this court a second time. By our former decisions we affirmed the judgments of the district court of Seward county in which the plaintiffs were successful. The cases were taken on error to the supreme court of the United States where our judgments were reversed, *Yates v. Jones Nat. Bank*, 206 U. S. 158; *Yates v. Utica Bank*, *Yates v. Bailey*, and *Yates v. Bank of Staplehurst*, 206 U. S. 181, where it was held that plaintiffs petitions were insufficient to charge the defendants with a common law liability for fraud and deceit. When the mandates were received by this court the causes were remanded to the district court of Seward county for further proceedings. Thereafter plaintiffs amended their petitions by interlineations, and thereby sought to change their causes of action so as to avoid the federal question. Upon a second trial the plaintiffs again had the judgments and from these judgments the defendants have appealed.

Defendants contend, among other things, that the amendments above mentioned were wholly insufficient to change the plaintiffs' causes of action; that they still charge a violation of the national bank act, and that question will be first considered.

An examination of the record discloses that the interlineations by which it was sought to amend the petitions consisted of some slight amplifications of the statements contained in the original petitions as theretofore amended. The amendments contain no material additional statement of facts, and the petitions still charge the defendants with making false statements to the comptroller of the currency as to the condition of the Capital National Bank, and this is the main foundation or basis for recovery. By the amendments plaintiffs attempt to charge that the defendants

knowingly and fraudulently and with the intent to deceive the plaintiffs made such statements and that they thereby induced the plaintiffs to become depositors in the Capital National Bank.

To the petitions thus amended each of the defendants demurred. The demurrers were overruled and the defendants excepted. It is probable that the demurrers should have been sustained, but defendants answered over and admitted that the Capital National Bank was organized under the national banking act, but denied that they signed the statements or reports made to the comptroller as stated in the petition; alleged that they had no knowledge of the falsity or untruth of any of them, or of the true condition of the Capital National Bank at the times mentioned in the amended petition; denied that they caused the reports to be published in the newspapers; denied that they caused them to be sent to the public or to the plaintiffs; denied that they had any knowledge that they were so sent by any of the officers or agents of the bank; they also pleaded a former adjudication and averred that the only acts performed by them were done in compliance with the provisions of the national banking act, and that their liability, if any, was measured
98 by the terms of that act and not otherwise.

Plaintiffs' replies were a general denial of the facts stated in the defendants' answers. Trials were had to the court without the intervention of a jury. There was a general finding for the plaintiffs, together with certain special findings as to each of the defendants, some of which are inconsistent with the general finding, and upon such findings the judgments appealed from were rendered. Defendants have renewed their objections to the sufficiency of the plaintiffs' amended petitions, and also contend that the testimony is insufficient to sustain the general finding upon which the judgments in question are predicated.

It is impracticable, considering the length of the petitions and the manner in which they were amended by interlineations, to set them forth in this opinion, and it is sufficient to say that we are of opinion that the amendments in no way changed the nature of the plaintiffs' causes of action; and unless the supreme court of the United States shall recede from its decision of these cases the petitions will be held insufficient by that court to state a common law liability for fraud and deceit as against the defendants who were simply directors of the Capital National Bank.

Coming now to the consideration of the additional evidence introduced upon the second trial of these cases we are of opinion that it is insufficient to charge the defendants with a personal liability for fraud and deceit. The testimony is clear, and practically without
99 dispute, that when defendants Yates and Hamer signed the reports of December 9, 1892, and December 28, 1886, which are the ones upon which this action is, in fact, predicated, neither of them had any personal knowledge of their falsity, but signed them in good faith, believing that they exhibited the true condition of the Capital National Bank. It is not shown that either Yates or Hamer ever had any communication or conversation with the plaintiffs, or any of them, in regard to the condition of the Cap-

ital National Bank. It is not shown that they, or either of them, had any knowledge that any published statements or cards containing any information as to the condition of the bank was ever sent to the plaintiffs, or any of them, by any officer or agent of the bank.

It follows therefore that the evidence is insufficient to charge them, or either of them, with ever having knowingly made any false statement in regard to the condition of the bank, or participated in sending any advertising matter, published statements, or any of the things mentioned in the plaintiffs' petition to them, or any of them; and having taken no part in said transactions it cannot be said that they knowingly participated in any of them. There being nothing in the record sufficient to bring defendants, Yates and Hamer, within the rule of liability announced by the supreme court of the United States in these cases and others, we are of opinion that the judgment, as to them, must be reversed.

As to the defendant David E. Thompson, it appears from the record that he did not sign either of the statements in question. Some evidence was introduced which tends to show that before the last report was signed Thompson had notice of a letter from the comptroller of the currency questioning the correctness of the former reports made to him by the directors, and requiring the bank officers to charge off certain worthless notes or obligations held by that institution; that thereafter Thompson refused to sign any statements to the comptroller of the currency and took no part in the management of the bank; that he disposed of some of his stock; that he was not informed in any way of the fact that published statements of the condition of the bank were sent by any agent or officer of the bank to the plaintiffs, if any such were sent, while it may be said that for a considerable length of time before the bank was closed by the comptroller he had some knowledge that its financial condition was questioned, still, so far as the record shows, defendant Thompson did not personally participate in any of the acts of which the plaintiffs complain and they do not claim that he ever had any conversation with or made any statement whatever to the plaintiffs, or any of them.

As we view the opinion of the supreme court of the United States in *Yates v. Jones Nat. Bank*, supra, there was required in this case of the directors of the bank only that standard of conduct expressly imposed by section 5239 of the Revised Statutes of the United States, and no higher duty may be rightfully established and demanded. A bank director is guaranteed immunity from liability under the very law that permits him to become a director. As an inducement to him to act in that capacity the law assures him that he is not to be liable except for that which he knowingly does. A knowledge must be brought home to the director that he is deceiving the individual wronged and may thereby occasion a loss to him. The director is not liable for his own mistakes or blunders, or for the mistakes or blunders of his brother directors; neither is he liable for the frauds and wrongs of the officers of the bank unless he has personal knowledge thereof or participates in such fraudulent acts. If it were not so there would

be great difficulty in securing men to assume the position of national bank directors. The rule for which plaintiffs contend, if carried to its ultimate conclusion, would make the director of the national bank, who has himself been imposed upon and deceived by its officers, and who has thereby suffered loss, liable to the depositors for the fraudulent acts of such officers. Such has not been the views expressed by the supreme court of the United States in any cases. The opinion of Justice White in *Yates v. Jones Nat. Bank*, supra, is based on a single proposition, that is, "Where a statute creates a duty and prescribes a penalty for non-performance the rule prescribed in the statute is the exclusive test of liability." In the argument on behalf of the appellees it is said: "We sought to avoid the application of this rule for the reason that while the national bank act expressly commanded the publication of the official report, it did not require the publication of a true report and therefore the publication of a false report did not violate any express mandate of the statute." (*Cochran v. United States*, 157 U. S. 286.) The

102 argument was that the making of a false report was not a violation of the United States bank act and that the remedy provided by section 5239 for violations of the statute did not reach the case and therefore the contention was that there was no statutory remedy for making a false report and that the plaintiffs in the court below could resort to their remedy at common law. This is a sort of legal refinement and the only objection to it is that it does not seem to be along ordinary logical lines. The trouble with this contention is that it would eliminate the federal courts from a construction of the United States statutes and their enforcement. This would make a failure of bank directors to closely observe the terms of the national banking act, though acting under it, an excuse for releasing them from all penalties to be inflicted under the act and by its provisions and the substitution of a different liability from that imposed by the statute.

In *Briggs v. Spaulding*, 141 U. S. 132, the bill was framed upon the theory of a breach by the defendants, as directors, of their common law duty as trustees of a financial corporation and of breaches of special restrictions and obligations of the national banking act. There plaintiffs commenced their action under the United States banking act, and claimed a liability of a violation of the same. It was there said that plaintiffs cannot, in an action to recover because of a violation of the banking act, be allowed to recover upon some other theory. The plaintiff may not jumble his causes of action together and then say to the defendant—If you are not liable
103 upon that which I have charged you with, then here is another construction that can be placed upon what I have said, and you are liable under that.

It may be said with much plausibility and reason that it should be the duty of the directors to look into the condition of the bank of which they are directors but that matter seems to have been determined by the supreme court of the United States in the case of *Briggs v. Spaulding*, supra, where it was said: "Persons who are elected into a board of directors of a national bank, about which

there is no reason to suppose anything wrong, but which becomes bankrupt in 90 days after their election, are not to be held personally responsible to the bank because they did not compel an investigation, or personally conduct an examination." That decision holds that if the bank directors fail to look into the condition of the bank they are not guilty of an ordinary want of care so far as the statute is concerned; section 5239 states in terms the non-liability of bank directors who fail to investigate the conditions of the bank. It may be that when one deposits money in a bank or takes stock in a bank thus putting his property in immediate control of other persons that he has a right to expect that the directors, who are supposed to manage the bank, will exercise at least ordinary care and prudence in the management of the bank's affairs, but the degree of care required rests of course with Congress which has control of the legislation.

In *Briggs v. Spaulding*, 141 U. S. 132, Chief Justice Fuller, in delivering the opinion of the court, among other things, said:
 104 (1) "Our attention has not been called, however, to any duty specifically imposed upon the directors as individuals by the terms of the act. (2) If any director participated in, or assented to, any violation of the law by the board he would be individually liable. * * * (3) It does not follow that the executive officers should have been left to control the business of the bank absolutely and without supervision, or that the statute furnishes a justification for the pursuit of that course. Its language does enable individual directors to say that they were guilty of no violation of a duty directly devolved upon them." (4) He cites 1 *Morawetz, Private Corporations* (2d ed.) sec. 556, to the effect that: "The liability of directors for damages caused by acts expressly prohibited by the company's charter or act of incorporation is not created by force of the statutory prohibition. (5) The performance of acts which are illegal or prohibited by law may subject the corporation to a forfeiture of its franchises, and the directors to criminal liability; but this would not render them civilly liable for damages. (6) The liability of directors to the corporation for damages caused by unauthorized acts rests upon the common law rule which renders every agent liable who violates his authority to the damage of his principal. * * * (7) The degree of care required (from a bank director) depends upon the subject to which it is to be applied, and each case has to be determined in view of all the circumstances. (8) They (bank directors) are not insurers of the fidelity of the agents whom they have appointed, who are not their agents but the agents
 105 of the corporation; and they cannot be held responsible for losses resulting from the wrongful acts or omissions of other directors or agents, unless the loss is a consequence of their own neglect of duty, either for failure to supervise the business with attention or in neglecting to use proper care in the appointment of agents. 1 *Morawetz, Private Corporations*, (2d ed.) sec. 551, et. seq., and cases. * * * (9) The relation between the corporation and them (bank directors) is rather that of principal and agent, certainly so far as creditors are concerned, between whom and the corporation

the relation is that of contract and not of trust. * * * (10)
 There are many things which, in their management, require the utmost diligence, and most scrupulous attention, and where the agent who undertakes their direction renders himself responsible for the slightest neglect. There are others where the duties imposed are presumed to call for nothing more than ordinary care and attention, and where the exercise of that degree of care suffices. The directors of banks from the nature of their undertaking, fall within the class last mentioned, while in the discharge of their ordinary duties."

The plaintiffs having failed to allege and prove that the defendants personally knew of, or personally participated in, the acts of the officers of the bank of which they now complain, it seems clear that if we follow the decision of the supreme court of the United States in these cases, they are not entitled to recover, and the judgments of the district court should be reversed as to all of the defendants. 106 It also is apparent that plaintiffs cannot produce any other or additional evidence which will render the defendants liable in these cases and therefore the judgments are reversed and the actions are dismissed. Judgment accordingly.

Reese, C. J., not sitting.

Swegick and Fawcett, JJ., dissenting.

107 LETTON, J., concurring in part:

I concur in the view that the amendments made after the remand do not change the issues and only set out more fully a cause of action for deceit at common law. The issues then, are the same as when the case was presented to the supreme court of the United States. A careful reading of the history of this case set out in the opinions of this court and in those of several inferior federal courts before which the question was presented shows that it was their opinion that the petitions charge only a liability at common law for deceit and not one under the national banking acts. The judgment of this court which was reversed by the supreme court of the United States was based upon the theory that the pleadings contained no federal question and stated merely a common law liability. The supreme court of the United States held that a federal question was presented and that "The measure of responsibility, concerning the violation by directors of express commands of the national bank act, is, in the nature of things, exclusively governed by the specific provisions on the subject contained in that act." *Yates v. Jones Nat. Bank*, 206 U. S. 158, 178.

I agree with the former judgment of this court and that of the several inferior federal tribunals before which the question was presented that the petitions state a cause of action at common law for deceit but think this court is bound by the opinion of the supreme Court of the United States. I am also inclined to the view that the evidence would support a judgment upon such a theory of 108 the case. The findings of the district court are to that effect.

I am not satisfied they are unsustained by the evidence. The presumption is that they are so sustained, but I have not examined

the evidence so critically as would be necessary to determine this for the reason that under the holdings of the supreme court of the United States as to the measure of duty and of liability of directors under the banking laws of the United States, I think a case has not been made. For that reason alone I concur in the conclusion.

* * * * *

109

Appellee's Motion for Rehearing.

Appeal from Seward County.

B. F. Good, Judge.

The undersigned appellee respectfully request- the court to grant a rehearing herein with view to the correction of what we think erroneous interpretation of the decision of the United States Supreme Court in *Yates v. Jones Nat. Bank*, 203 U. S. 158; of the statutes of the United States upon which that case is predicated; of the law concerning the dismissal of this case and of erroneous construction as to the sufficiency of the evidence to support the findings and judgments of the trial court.

1.

It is said in the syllabus of this case, paragraph two, that "where, by the federal statute concerning national banks a responsibility is made to arise against the directors from its violation knowingly, proof of something more than negligence is required and it must be shown that the violation was intentional" whereas the correct and proper construction of such statute is, "not * that as a condition of liability there should be proof of something more
110 than recklessness,—not that there should be an intentional violation,—but a violation 'in effect' intentional" and "there is 'in effect' an intentional violation of a statute when one deliberately refuses to examine that which it is his duty to examine," *Thomas v. Taylor*, 32 Sup. Ct. 403.

2.

The deciding opinion in this case concedes that if it be considered as a common law action of deceit, the petition states a cause of action, the evidence is sufficient to support the judgment and consequently the judgment should be affirmed.

It appearing therefore that this case is by the decision of this court, based and predicated upon the national bank act and the violation of the provisions thereof, it follows that the measure of responsibility and rule of liability provided by that act, should be applied, and that in so doing, this court is bound by the United States Supreme Court's construction and interpretation thereof in this case; that this court's construction and interpretation of the national bank laws, Title 62 of the Rev. St. of the U. S. and section 5239 thereof, is in conflict with the decision of the United States Supreme Court in this case and that the plain-

tiff has therefore been, in effect, *ed* denied a right and privilege conferred upon it by the constitution and statutes of the United States; of Title 62 of the Rev. St. of the U. S. and especially section 5239 thereof.

3.

This court has erred in that it has violated the mandate of the United States Supreme Court in this case in that, whereas, by the decision, opinion and mandate of said court this case was reversed and remanded for further proceedings not inconsistent with the opinion of the said United States Supreme Court, when in
111 fact the proceedings in this case in this court have been and are inconsistent and in direct conflict with the opinion of the United States Supreme Court, in that this court has placed a construction upon the national banking laws in direct conflict with the construction placed thereupon by the United States Supreme Court in this case and that the direct and immediate effect of said erroneous construction has been and is to deny to the plaintiff the right to recover under the national bank laws Title 62 of the Rev. St. of the U. S. and especially section 5239 thereof, and to nullify the right and privilege conferred upon and granted to appellee thereby.

4.

This court has erred in that by its decision it has denied to the appellee the right to recover under the national bank laws, Title 62 of the Rev. St. of the U. S. and especially §5239 thereof, and has nullified the right and privilege conferred upon and given to appellee thereby.

5.

The court erred in not deciding that although this case be considered as predicated on false representations contained in reports published pursuant to the directions of the Comptroller, the evidence and findings of the trial court include every element necessary to sustain recovery under the national bank laws,—“the rule of responsibility declared by them” have “been satisfied” (Thomas v. Taylor) and the judgment should be affirmed.

6.

The opinion of Judge Letton says that under the holdings of the United States Supreme Court as to the measure of duty and liability of directors under the banking laws of the United States a case has not been made,—whereas even though this case be considered as arising under that act and the measure of duty and of liability
112 established thereby be applied thereto, we have still made a case and are entitled to an affirmance of our judgment; that is, although the measure of responsibility and the test of liability established by the federal statute be applied to this case our petition states a cause of action and the evidence and findings are sufficient to sustain our judgment.

7.

It is said in the opinion of Judge Hamer that there is nothing in the record sufficient to bring the defendant within the rule of liability announced by the Supreme Court of the United States in this case and others, and that the judgment must therefore be reversed, whereas, the record discloses evidence amply sufficient to sustain judgment against the defendant under the rule of liability and measure of responsibility announced by the Supreme Court of the United States.

8.

It is said in the opinion of Judge Letton that:

"A careful reading of the history of this case, set out in the opinions of this court, and in those of several inferior federal courts before which the question was presented, shows that it was their opinion that the petitions charge only a liability at common law for deceit, and not one under the national banking acts. The judgment of this court, which was reversed by the Supreme Court of the United States, was based upon the theory that the pleadings contained no federal question, and stated merely a common-law liability. The Supreme Court of the United States held that a federal question was presented, and that the measure of responsibility, concerning the violation by directors of express commands of the national bank act, is, in the nature of things, exclusively governed by the specific provisions on the subject contained in that act." *Yates v. Jones Nat. Bank*, 206 U. S. 158, 178, 27 Sup. Ct. 638, 645 (51 L. Ed. 1002).

I agree with the former judgment of this court, and that of the several inferior federal tribunals before which the question was presented, that the petitions state a cause of action at common law for deceit, but think this court is bound by the opinion of the Supreme Court of the U. S.

Thus assuming and deciding that the United States Supreme Court held our petition necessarily presented a federal question or that it did not state a cause of action for deceit at the common law,—whereas that court did not decide that our petition did not state a cause of action for deceit at the common law, not that it necessarily presented a federal question, but based its judgment and conclusion on the fact that the proof in the record then before it disclosed that plaintiff had relied for recovery, on reports published pursuant to the directions of the Comptroller of the Currency under the requirements of the national bank act. The decision of the United States Supreme Court concedes us the right to maintain this action under the present petition as an action at common law for deceit, provided, the record shows we have not relied for recovery upon any act or duty required or prescribed by the express commands of the federal statutes, i. e. reports published pursuant to the call of the Comptroller. The findings of the trial court show it expressly based our right to recovery upon the voluntary and unofficial statements and reports and not upon the official

reports. And the evidence contained in the record sustains the findings and judgments.

9.

It is said in the opinion of Judge Hamer that it was decided by the United States Supreme Court in this case that plaintiffs' petition was insufficient to charge the defendants with a common law liability for fraud and deceit, whereas, that court did not so decide and plaintiffs' petition was then and now is sufficient to charge the defendants with a common law liability for fraud and deceit.

10.

In his opinion Judge Hamer says the plaintiff "still charge
114 the defendants with making false statements to the Comptroller of the Currency as to the condition of the Capital National Bank and this is the main foundation or basis for recovery," whereas the petition does not so charge nor is such charge made the foundation or basis for recovery.

11.

In his opinion Judge Hamer assumes that the United States Supreme Court decided that this case could not be maintained at common law for fraud and deceit, whereas, the Supreme Court did not so decide, but concedes plaintiff the right to maintain this action as at common law for fraud and deceit, so long as recovery is not based upon a violation of any of the express commands of the national bank act.

12.

The opinion of Judge Hamer assumes that the United States Supreme Court decided that this action could not be maintained as arising under the federal statute, whereas, the court did not so hold but concedes the jurisdiction of the state courts, the only requirements being that the measure of responsibility prescribed by the federal statute shall be observed and applied.

13.

In his opinion Judge Hamer says, "unless the Supreme Court of the United States shall recede from its decision of these cases, the petitions will be held insufficient by that court to state a common law liability for fraud and deceit as against the defendants who were simply directors of the Capital National Bank,"—thus assuming that that court held the plaintiffs' petition did not state a cause of action at the common law for fraud and deceit, whereas, the Supreme Court did not decide and plaintiffs' petition does state
115 a cause of action for fraud and deceit at common law.

14.

This court erred in not deciding that this case could be maintained for fraud and deceit at common law, as predicated upon

false representations exclusive of any acts done pursuant to the express commands of the national bank act, and that the evidence and findings of the trial court is sufficient to sustain the judgment on that theory.

15.

It is said in the opinion of Judge Hamer that: "The plaintiffs having failed to allege and prove that the defendants personally knew of or personally participated in the acts of the officers of the bank of which they now complain, it seems clear that if we follow the decision of the Supreme Court of the United States in these cases they are not entitled to recover and the judgments of the District Court should be reversed as to all the defendants." This statement assumes that our petitions failed to allege that the defendants personally knew of or personally participated in the acts charged in the petitions whereas such petitions do contain such allegations and do charge the defendants with knowing — violations and guilty knowledge.

This statement further assumes that the Supreme Court of the United States decided that in order to sustain recovery under the national bank act it is necessary to allege and prove that the defendants personally knew of or personally participated in the acts charged in the petitions whereas the United States Supreme Court did not so decide and §5239 Rev. St. of the U. S. does not so provide.

This statement also assumes that the plaintiffs failed to prove that the defendants personally knew of or personally participated in the acts charged in the petition whereas the evidence is amply sufficient to sustain said charge.

16.

The court erred in dismissing this case and if there is reversible error in the record, the case should not be dismissed but remanded to the lower court for further proceedings in accordance with the law.

17.

The opinion of this court seems to be based upon the theory that this case is necessarily controlled by the national bank act; that it must necessarily be tested by the measure of responsibility prescribed in section 5239 Rev. St. of the U. S.; that under the interpretation and construction of that statute made by the United States Supreme Court in this case, this court is compelled to hold that recovery cannot be sustained without proof of actual knowledge; that the United States Supreme Court decided in this case that this action could not be maintained as an action at common law for fraud and deceit, and that the *frame* of our petition precluded that view or theory; whereas the holding of the United States Supreme Court is that this action can be maintained under our present petition as an action at common law for fraud and deceit and that the rule of liability provided by the common law is applicable to such action and that our judgment can be sustained upon that theory provided it does not appear by the record that plaintiff has relied

for recovery upon any act done pursuant to an express command of the national bank act; also, that this court has jurisdiction to hear and determine this action as arising under the federal statute and as predicated upon the violation of a duty required by the express commands of the national bank act so long as it properly applies the measure of responsibility and the rule of liability established by that act; and finally that that act does not require proof of
 117-119 actual knowledge but that it is sufficient if it be shown the defendants acted recklessly; that they refused to examine that which it was their duty to examine; or that they disregarded the directions of the officer appointed by the law to examine the affairs of the bank.

18.

The court erred in not deciding that since by their answers the defendants alleged that if they "neglected any duty as such director or stockholder or committed any of the wrongs complained of in the plaintiffs' amended petition, whereby the said bank became insolvent and gave rise to a cause of action against this defendant sounding in damages * * *." And that "if such damages resulted from the conduct or neglect of duty on the part of this defendant, a judgment therefor under the law could only be recovered by the said bank * * * of by the receiver * * *"—they thereby admitted that they neglected their duties as such directors and committed the wrongs complained of in plaintiffs' amended petition whereby the bank became insolvent and that such damages resulted from the conduct or neglect of duty on the part of the defendants,—and therefore admitted their liability to the plaintiff under the national banking laws, Title 62 Rev. St. of the U. S. and §5239 thereof, and the judgment of the trial court should be affirmed.

Respectfully submitted,

UTICA BANK, *Appellee*.
 By R. S. NORVAL &
 J. J. THOMAS,
 L. C. BURR.

* * * * *

120 SEDGWICK, *J.*, dissenting:

It seems to me that the opinion and the concurring opinion are both predicated upon the capital error of assuming that it has been decided by the supreme court of the United States that the action is one for deceit at common law and for that reason cannot be maintained. The opinion says that it was held (by the supreme court of the United States) that plaintiff's petitions were insufficient to charge the defendants with a "common law liability for fraud and deceit", whereas that court held that the action was essentially for a violation of the federal statute, and expressly holds that such actions can be maintained in the state courts, and then reverses the judgment of this court, not because of any defect in the petition, that question not being discussed or even mentioned, but because

the trial court erroneously instructed the jury as to liability under the federal statute.

The opinion discusses the proposition somewhat at length and concludes that "unless the supreme court of the United States shall recede from its decision of these cases, the petition will be held insufficient by that court to state a common law liability for fraud and deceit as against the defendants who were simply directors of the Capital National Bank." It seems to me wonderful that any member of the court should so completely misunderstand the opinion of that court. The concurring opinion falls into the same remarkable error, as the first sentence shows. "I concur in the view

that the amendments made after the remand do not change the issues, and only set out more fully a cause of action for deceit at common law." This is exactly the reverse of what

the supreme court in fact decided. "Directors of a national bank who merely negligently participated in or assented to the false representations as to the bank's financial condition contained in the official report to the Comptroller of the Currency * * * cannot be held civilly — to anyone deceived," etc. *Yates v. Jones Nat. Bank*, 27 Sup. Ct. Rep. 638 (206 U. S. 158.). This is the decision of the merits of the case as stated in the third paragraph of the syllabus. In the opinion the court says that the basis of the assignments of error is found in the instructions given by the trial court and in refusals to give instructions. These instructions and refusals are quoted by the court and they all relate to this one point. Is proof of negligence only sufficient—must the violation of the federal statute be in effect intentional? These instructions and refusals furnish the sole ground for reversal; all other points are resolved in favor of defendant in error. The court said that it was suggested by the plaintiffs in error that the action to enforce a liability created by the federal statute was "so inherently federal" that "the state court was wholly devoid of jurisdiction * * * and that such action could only be brought in the courts of the United States." It was thought sufficient in the opinion to say that such contentions were without merit; but the character of the action, and the right to bring it in the state courts is plainly stated in the fourth paragraph of the syllabus. "State courts may enforce, against

directors of a national bank who have made false representations as to the bank's financial condition in the official report to the comptroller of the currency, the civil liability prescribed by U. S. Rev. St., sec. 5239, which * * * makes every director who participated in or assented to the same civilly liable to persons who have suffered damage in consequence thereof." How is it possible that any one should suppose that the court held that the pleadings were defective or that the judgment was reversed because the action was the common law action for fraud and deceit?

It is said in the opinion which has been promulgated as the opinion of this court: "As we view the opinion of the supreme court of the United States in *Yates v. Jones Nat. Bank*, supra, there was required in this case, of the directors of the bank, only that standard of conduct expressly imposed by section 5239 of the Re-

vised Statutes of the United States (U. S. Comp. St. 1901, p. 3515), and no higher duty may be rightfully established and demanded", and this is discussed at length in the opinion. This statement is entirely outside of the case at bar. There is no attempt to establish or demand any higher duty of these directors than is enforced by the federal statute. No action against the directors of a national bank for fraud and deceit at common law can be maintained. This was decided when this case was formerly before the supreme court of the United States and has been since emphatically decided by that court,

and no such claim can be made in this case. The question 123 is whether these directors are liable under the federal statute, and this action is prosecuted under that statute to enforce such liability. No action could be presented in any other way.

No one who will take the pains to read the opinion need make such mistakes. If the instructions of the trial court had correctly stated the law as to liability under the federal statute the judgments would have been affirmed.

When the case was in this court the first time this court followed the law announced in the earlier case of *Gerner v. Mosher*, 58 Neb. 135, and held that in signing the reports to the comptroller of the currency the directors by such act vouched for, or certified to, the absolute truthfulness of the statements therein contained, and not that the report was correct so far as the directors knew or had been advised by the proper performance of their duties as directors. This court thereupon held that the instructions given by the trial court were not erroneous. *Yates v. Jones Nat. Bank*, 74 Neb. 734. The supreme court of the United States reversed the case upon this point only, and held that "where by law a responsibility is made to arise from the violation of a statute knowingly, proof of something more than negligence is required, that is, that the violation must in effect be intentional." To determine the meaning of this language of that court in this case is now the question of law for this court upon this appeal. If there ever was any doubt of the holding of that court upon this point that doubt has emphatically been set at rest by a

later decision where the language used by that court in this 124 case is quoted and its meaning fully stated and made plain.

Thomas v. Taylor, 224 U. S. 73. That case originated in a nisi prius court of the state of New York. It was afterwards taken to the appellate division and to the court of appeals of that state. The court of appeals adopted the opinion of the appellate division and the supreme court of the United States affirmed the decision of that court. It appears that the action was begun as a common law action for fraud and deceit and was substantially so prosecuted in the trial court, and when it reached the appellate division it was insisted that it could not then be considered as an action to enforce the liability imposed by the federal statute. The state court held that a common law action for fraud and deceit could not be sustained against the directors of a national bank but that "a judgment in an action against such directors, tried and determined in accordance with common law principles for publishing a false report which induced the plaintiff to purchase stock in the bank will not be reversed

when the case, both as to pleading and proof, meets the statutory requirements, especially when defendants do not claim to have been prejudiced by the theory upon which the action was tried. A right decision will not be reversed merely because a wrong reason has been assigned therefor." (124 App. Div. (N. Y.) 53). The supreme court of the United States approved this holding, and again decided that no common law action for fraud and deceit could be maintained, and yet this court states as a reason for reversing this judgment that "unless the supreme court of the United States

125 shall recede from its decision of these cases, the petitions will be held, insufficient by that court to state a common law liability for fraud and deceit as against the defendants, who were simply directors of the Capital National Bank." That court in this very case had decided that no possible allegation can be sufficient to state such common law liability; that is, that no common law action could be sustained.

The case of *Thomas v. Taylor*, 224, U. S. 73, will leave no possible room for doubt as to the measure of liability of the directors in making these reports to the comptroller. In that case, as in the case at bar, the assets of the bank had become depleted and the reports to the comptroller misrepresented the condition of the bank. The plaintiff had not seen the reports to the comptroller, but had been informed of their contents, and purchased some of the stock of the bank relying upon the statements in those reports. On account of the false reports he was compelled to pay an assessment upon the stock which he bought and brought his action to recover damages so sustained. In the syllabus the court stated the law as follows: "Although the common law action of deceit does not lie against directors of a national bank for making a false statement, and the measure of their responsibility is laid down in the National Banking Act, *Yates v. Jones Nat. Bank*, 206 U. S. 158, an action may be maintained in the state court regardless of the form of pleading if the pleading itself satisfied the rule of responsibility declared by that act. There is, in effect, an intentional violation of a

126 statute when one deliberately refuses to examine that which it is his duty to examine." The opinion is devoted largely to an explanation of the holding in the case at bar when it was before that court. The court said: "The contention goes beyond what was said in *Yates v. Jones Nat. Bank*. The language there is 'that where by law a responsibility is made to arise from the violation of a statute knowingly, proof of something more than negligence is required—that is, that the violation must in effect be intentional.' Not, therefore, that as a condition of liability there should be proof of something more than recklessness; not that there should be an intentional violation, but a violation 'in effect' intentional. There is 'in effect' an intentional violation of a statute when one deliberately refuses to examine that which it is his duty to examine." And again, the court said: "There was an issue of knowledge tendered by the pleadings, and to sustain their side of the issue plaintiffs in error offered testimony of the correctness of the

books and to show that the report was a true copy of them, as it was alleged in their answer to be."

The case at bar is quite similar. There is evidence that the comptroller became dissatisfied with the conditions of the bank and wrote to the officers of the bank to call the attention of the directors to its condition and to send a statement of what they found to the comptroller. This was done and these defendants signed the statement to the comptroller. It is therefore conclusive that these defendants knew the condition of the bank. After this the reports 127-129 were published as before, and the plaintiffs were deceived and damaged thereby. There is a large mass of evidence in the case, but it is useless to discuss it in view of the total inadequacy of the opinion and concurring opinion to discuss or even to state the questions of law upon which this decision depends.

Fawcett, J., concurs.

* * * * *

130 And afterwards, to-wit, on the 7th day of January, 1914, there was rendered by said supreme court and entered of record upon the journal thereof a certain Order, in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1914, Jan. 7.

No. 17278.

UTICA BANK, Appellee,
vs.
CHARLES E. YATES et al., Appellants.

Appeal from the District Court of Seward County.

This cause coming on to be heard upon motion of the appellee for a rehearing herein, was argued by counsel and submitted to the court and a vote of the judges was had and taken upon a motion to allow a rehearing, and Judges Barnes, Hamer and Rose voted against allowing a rehearing and Judges Sedgwick, Letton and Fawcett voted to allow a rehearing and thereupon Chief Justice Reese voted in favor of allowing a rehearing and declared said motion to be carried; upon due consideration whereof the court doth find probable error in the judgment of the court heretofore entered herein; it is, therefore, ordered and adjudged that said motion of appellee for a rehearing be and the same hereby is allowed and a rehearing herein ordered.

J. FAWCETT,
Acting Chief Justice.

* * * * *

131 Hamer, Rose and Barnes, JJ. dissent from the order granting a rehearing herein and protest against the entry thereof on the

journal of this court for the reason that it is void for want of a qualified constitutional majority to grant such a rehearing, the Chief Justice having been consulted by the plaintiff and having so announced when the cause was on for hearing. *Shumway v. State*, 82 Neb. 152, 165.

J. FAWCETT,
Acting Chief Justice.

* * * * *

132 The appellants, Charles E. Yates and Louisa P. Hamer as administratrix of the estate of Ellis P. Hamer, deceased, each separately moves the court to set aside, vacate and hold for naught so much of the record and proceedings of January 7, 1914 as shows the motion for rehearing was decreed carried and orders and rehearing to be had for the reasons which follow this and the other two motions.

2. The appellants Charles E. Yates and Louisa P. Hamer as administratrix of the estate of Ellis P. Hamer, deceased, each separately moves the court to vacate, set aside and hold for naught the order of May 17, 1913 ordering an oral argument upon a motion for rehearing in this action for the reasons following this and the other two motions.

3. The appellants Charles E. Yates and Louisa P. Hamer as administratrix of the estate of Ellis P. Hamer, deceased each separately moves the court to correct the proceedings and order of the court of January 7, 1914 so as to eliminate therefrom the deciding vote of the Chief Justice, the Honorable Manoaah B. Reese from said order and proceedings and from the tie vote of the remaining six judges who heard and considered this case to overrule the

133 motion of appellees for rehearing and to order the issuance of the mandate of the court to execute and carry into effect the former judgment of this court of January 31, 1913 reversing the judgment of the district court and dismissing the action, for the following reasons.

1. The deciding vote of Chief Justice Reese ordering and allowing the rehearing, is without authority and void because of his disqualification on account of having been attorney for the plaintiff on the subject matter of this action and proceeding as declared by him from the bench in the presence and with the knowledge of the other judges in the open session of the court when the cases for the first time appeared before the court on the formal motion to advance for an early hearing.

2. The deciding vote of the Chief Justice is in violation of Chap. 19, Sec. 37 of the compiled Statutes of Nebraska, which provides that "a judge or justice is disqualified from acting as much * * * in any case * * * where he has been attorney for either party in the action or proceeding," without the mutual consent of all the parties which was never had in any form nor entered of record or made in writing in this action, and said vote was an action by the Chief Justice as a Judge or Justice in this action and in the proceeding therein of considering and ordering a rehearing.

3. The deciding vote of the Chief Justice on the order for rehearing, is in violation of art. 6, sec. 2 of the Constitution of this state which provides,—“The Supreme Court shall consist of seven judges; and a majority of all elected and qualified judges shall be necessary to constitute a quorum or pronounce a decision,” and it required the vote of four qualified judges of this court to carry the motion and to make the order for a rehearing which quorum and majority vote was not cast as is shown by the order and proceedings of the court of January 7, 1914 and by the showing filed 134 herewith in support of this motion.

4. The declaration of the Chief Justice of his disqualification and repeated retirement from the bench upon all of the public hearings of this case, which was acquiesced in and approved by the six judges who heard the case, and by counsel for all the parties, is an adjudication by the court of such disqualification which prevents counting the vote of the Chief Justice on the motion for rehearing and required the order to be entered on the tie vote of the other six judges that the motions stand overruled and the former judgment adhered to.

5. It is now disclosed by the record and proceedings of this court that the six judges who were authorized and qualified to hear and determine the motion for rehearing cast their votes three for rehearing and three against it, which by law and the well recognized rule and practise of this court and courts in general, had the legal effect of overruling the motion for rehearing and of adhering to and making effective the former final judgment of this court, which reversed the judgment of the district court and dismissed the action, and of dismissing these appellants without day, which rule was illustrated and applied in *Shumway vs. State*, 82 Neb. 152, 165.

6. These appellants had no knowledge or information, either personally or by counsel that the Chief Justice would act or participate or had acted or participated, in any of the matters or proceedings in this case and had no reason to challenge or object to such action, until it first appeared in the proceedings and order of January 7, 1914, and they at all times relied upon his own stated disqualification that he would not so act.

7. The order of May 17, 1913 directing re-argument of the motion for rehearing, is null and void and should be set aside for the reasons above stated.

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8. The order of May 17, 1913 was as the appellants believe, carried only by the participating and deciding vote of the Chief Justice, which does not appear upon the record, but rests within the judicial knowledge of the court and of each one of the other six judges who participated in and considered that order, all of which was without the knowledge or consent of these appellants, either personally or by counsel and is only now disclosed by the record of the proceedings upon the order of January 7, 1914 and there was no opportunity or occasion so far as the appellants personally or by counsel knew, to challenge or object to such action of the Chief Justice on the order of May 17, 1913.

9. That the record, proceedings and order of January 7, 1914 allowing a rehearing should be amended and entered on the journal as the tentative order is now drawn by the clerk of the court with the exception that it should not recite "Was argued by counsel," and after reciting the vote of the six judges, should read,—“And thereupon, upon due consideration whereof the court does not find probable error in the judgment of the court heretofore entered herein and the motion of appellee for rehearing having failed to receive the vote of the majority of the qualified judges of this court in support thereof, the same stands overruled and it is therefore ordered and adjudged, that said motion of appellee for a rehearing be and the same is overruled, and a rehearing denied and the former judgment of this court stands approved and the clerk is hereby directed to issue a mandate to the District Court of Seward County to execute and carry into effect the prior judgment of this court as directed in the majority opinion therein.”

FRANK E. BISHOP,
FRANK M. HALL,
Attorneys for Appellants.

* * * * *

143 Supreme Court of Nebraska, January Term, A. D. 1914,
Jan. 14.

No. 17278.

UTICA BANK, Appellee,
vs.
CHARLES E. YATES et al., Appellants.

Appeal from the District Court of Seward County.

REESE, C. J.:

In view of the controversy with reference to my action in voting to allow a rehearing in this cause, I deem it but just to all concerned that I make this statement to go upon record.

First, when the case was called I did say that I had been consulted by one of the plaintiffs and felt that I ought not to take any part in the decision of the case, and, on each occasion when the case came up for consideration in any form, if in court I withdrew, if in the consultation room I kept silent. I was acting in entire good faith and believed that I should take no part in the decision.

When the matter of allowing an argument on the motion for rehearing came up, I found the judges divided, and, as allowing the argument could have no necessary bearing upon the merits of the case, I felt free to so vote as to allow a full investigation of the case, and voted to allow the argument. In this I believed then and still believe that I discharged a plain duty. I took no further action in the matter. The motion was argued in my absence and when the

question of granting the rehearing came up I found by the discussion that Judges Letton, Fawcett and Sedgwick each desired the rehearing, Judges Barnes, Hamer and Rose opposing it. Judges Barnes and Hamer, while protesting against my vote did it in a gentlemanly and personally friendly way, I stated that the vote would not
144 be completed then and that I would take time to consider the matter more fully, and that when I did vote it would be upon my own judgment. The matter went over to a later sitting. A few days thereafter I met Judge Deemer, at a meeting of the State Bar Association at Omaha, a long time member of the Iowa Supreme Court and former Chief Justice thereof, and in whose integrity and ability, I, with all others so far as I know, have the fullest confidence, and I presented the matter to him without naming the case nor the issues involved and asked his judgment as to my duty. He frankly gave it, saying that the question was upon a matter of procedure only and had nothing to do with the merits of the case, and if three judges were requesting the opportunity for further investigation, he thought I should vote to give it to them. When the question again came up I stated to all my associates the conversation with Judge Deemer, his judgment in the matter, which agreed with my own, and I should and did vote upon the motion by which the rehearing was granted. I did what I conceived to be my plain duty in the matter. If I erred, the error was my own. I cannot conceive of an occasion ever arising where three of my associates are demanding an opportunity to further hear and investigate a cause as against three who desire to deny that right, that I should remain silent and by my silence deny that right, even though I may be disqualified to pass upon the merits of the case.

It is my belief that a case is pending until the doors of the court are finally closed against it. The filing of an opinion, either affirming or reversing a judgment of the district court is but one of the steps in the litigation, subject to be overturned or modified should a rehearing be granted and the case heard further. If upon an application for rehearing the six judges are equally divided and this should be held to be a refusal to rehear the case, the doors of the court are effectively closed by the three judges, and the decision is, in effect, rendered by the three, while the constitution and
145 statutes require the concurrence of four.

In conclusion I think I ought to say a word as to an error into which I did fall. It is true that I stated from the bench that I had been consulted in the case and should not take any part in the hearing. It is true that I invariably left the court room on each occasion when the case was up for argument and never at any time took any part in the discussion of the merits of the case.

At the time of the failure of the Capital National Bank of Lincoln, over twenty years ago, Mr. Jones of the Jones National Bank of Seward, applied to me to assist in procuring a return to him of certain remittances which he had made to that bank after its failure, perhaps on the day its doors were closed. I went to the bank, I think alone, but Mr. Jones may have been with me, when assurance was given by the National Bank examiner that the Jones National

Bank would be protected and that the remittances so made would not go into the bank funds. I am not very clear as to the details of what occurred at the bank, but my recollection is that the Jones mail was surrendered unopened and carried away. As to this I am not entirely certain. At that time Mr. Jones said something about bringing a suit for his previous deposits in the bank. I told him I would not do it, saying he would become involved in long, tedious and expensive litigation, and the subject was dropped. Upon reflection I recall that what I did for Mr. Jones was a neighborly act, that I neither charged nor received any compensation therefor. When this case came up before the court I concluded that the suit above referred to had been brought and that this was the case. So believing, I declined to take part in the hearing. The whole matter had practically left my mind. I now see by the records that this action was commenced more than two years after the bank failure, by other attorneys. I was never at any time consulted by Mr.

146-163 Jones nor his counsel as to the bringing or maintaining of this suit—never employed as attorney or counselor and have known nothing of the case. My error was in supposing that this suit was based upon the matters spoken of by Mr. Jones to be at the time referred to. So far as I now know I never knew any of the plaintiffs nor officers of the other banks, nor did I ever consult, nor was I consulted by any of them, save alone by Mr. H. T. Jones upon his own matters, as above stated.

* * * * *

164-176 These causes coming on to be heard upon motion of appellees for an extension of time within which to file briefs herein, was submitted to the court; upon due consideration whereof, it is by the court ordered that said motion for extension of time be, and the same hereby is, sustained, and appellees given until February 12, 1914, to serve and file briefs.

M. B. REESE,
Chief Justice.

* * * * *

177 On oral application of attorney, it is by the court ordered that appellants in above entitled causes be, and hereby are, given leave to file reply briefs by March 1, 1914.

M. B. REESE,
Chief Justice.

And afterwards, to-wit, on the 3rd day of April, 1914, there was filed in the office of the clerk of said supreme court, a certain order, rendered by said supreme court and entered of record on the journal thereof, which said order is in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1914, Ap'l 3.

No. 17278.

*UTICA BANK, Appellee,

vs.

CHARLES E. YATES et al., Appellants.

Appeal from the District Court of Seward County.

The motion of appellant to set aside the order of January 7, 1914, granting a rehearing sustained. Thereupon it was moved by Sedgwick, J., as follows:

"Whereas it appears that there is not a constitutional majority of this court who think that the findings and judgment of the district court ought to be reversed, and this court now has full jurisdiction of these cases; I move that the former judgments of this court reversing and dismissing these case be vacated and set aside and the cases resubmitted for further consideration and final decision."

On this motion the court being equally divided, the motion is declared lost, and a rehearing denied.

J. FAWCETT,

Acting Chief Justice

And on the same day there was filed in the office of the clerk of said supreme court, a certain written statement made by Honorable Samuel H. Sedgwick, one of the judges of said court, and which said statement, was entered of record on the journal of said court and is in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1914, Ap'l 3.

* * * * *

If the three members of this court who consider the findings and judgment of the trial court ought to be reversed insist that the former judgment of this court reversing the trial court shall stand and a mandate shall be sent down reversing the trial court, I think it is my duty to place upon record a brief statement of my views in the matter.

After the order had been entered reversing the findings and judgment of the trial court, one of the four judges who had made that order found matters in the record which convinced him that the order was wrong, and voted for a rehearing. As this left only three members of the court who held that the findings and judgment of the trial court ought to be reversed, I suppose as a matter of course

*Reese, C. J., not sitting.

there would at once be an unanimous court to set aside the former order reversing those findings and judgment. The general practice of this court had been to consider any proposed order or judgment defeated unless a constitutional majority supported such order or judgment. This practice applied under the above circumstances would result in sending down a mandate reversing the findings and judgment of the trial court while this court had full jurisdiction of the whole matter and no constitutional majority of the judges considered such reversal right. Such a thing had never been done before so far as I know and it did not occur to me that any judge of this court would consent to such a result. In most cases the practice of taking no affirmative action without the support of a constitutional majority is wholesome and generally results in justice. But to apply such a practice when it results in reversing the findings and judgment of the trial court without a majority in favor of so doing seems to me to make use of a technicality for an improper purpose. In saying this I do not adopt the suggestion of plaintiff's brief that it indicates an unusual interest in this particular case on the part of the judges who refuse to concur in setting aside the former order of this court. I think that such suggestions are improper; that each member of the court should be free to act as his judgment dictates. The position they take however is without any precedent in this or any other state, so far as I know. In the case of *Shumway v. State*, 82 Neb. 152, after full investigation, it was found that only three members of the court thought the verdict and judgment of the trial court ought to be reversed, and those who thought there should be an affirmance were so fully advised that they were unwilling to delay for further investigation. Therefore, there could not be a majority for reversal in any event and the judgment was affirmed. The constitution provides that "a majority of all the elected and qualified judges shall be necessary to constitute a quorum or pronounce a decision." Art. VI, sec. 2. These cases were brought here to obtain a decision that the judgments of the district court be affirmed or that they be reversed. The court still has jurisdiction of the cases, and is enforcing a decision that reverses the district court while there is not a majority of the court who consider it right to do so, but it cannot be corrected because of a technicality of practice. I did not suppose that any one would insist upon such a technicality, and thought that an order properly framed to set aside the former order of this court would be unanimously concurred in, and that the cases would be fairly re-submitted for consultation, discussion and final decision by the court. I think that the motion to set aside the former orders of this court should be sustained.

J. FAWCETT,
Acting Chief Justice.

And on the same day there was filed in the office of the clerk of said supreme court, a certain written statement made by Honorable John B. Barnes, one of the judges of said court, and which state-

ment was entered of record on the journal of said court, and is in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1914, Ap'l 3

* * * * *

BARNES, J.:

When this case was decided a constitutional majority of 181 the court adopted the opinion reversing the judgment of the district court, and judgment was rendered accordingly. A motion for a rehearing was presented, and on that question the court was equally divided. A motion was then made to vacate and set aside the former judgment. The court being equally divided, the motion was lost. The motion for a rehearing having been declared lost our former judgment reversing the judgment of the district court stands unchanged for want of a constitutional majority to set aside the same.

J. FAWCETT,
Acting Chief Justice.

And on the same day there was filed in the office of the clerk of said supreme court a certain Statement of Honorable William B. Rose, one of the judges of said court, which said statement is in the words and figures following, to-wit:

* * * * *

ROSE, J.:

Plaintiffs question the propriety of further judicial participation by me in this case and suggest as reasons that I am interested in the result; that my personal relations with defendant Thompson are intimate; that my attitude has been that of a partisan and an advocate; that in former stages of the litigation I assisted in preparing briefs; and that my brother is an attorney for a party to the suits. These suggestions were made after I had participated, without objection, in the determination of these cases and had voted 182 against plaintiffs' motions for a rehearing. While the disqualifying imputations are without proof, I am prompted by a solemn sense of duty to make and place on record the following statement:

I have never had any interest, direct, remote or contingent, in any litigation, business or property of any party to these suits and I am personally indifferent to the result.

I have never been on intimate relations of any kind with any of the suitors. Though I have had a speaking acquaintance with defendant Thompson for nearly a quarter of a century, I am confident we have never conversed with each other more than thirty minutes altogether during that entire time.

I have never assisted in any way in the preparation of any brief for any party to these suits nor rendered any service therein for any attorney or party. My brother and I have never been partners in any business or profession, and have never officed together.

While the legislature has prescribed the disqualifications of judges, the lawmakers have not excused a judge of the supreme court from participating in a case wherein his brother appears as an attorney. Longing to avoid a situation so sensitive, I took counsel of my associates soon after I became a judge, but was not excused by them from judicial responsibility on account of my brother's appearance for suitors. Since then the legislature has been in session three times without changing the statute on this subject. I have followed the law and the custom established by Judge Maxwell, Judge Norval and Judge Barnes. I always decline, however, to participate in such cases, where a decision by a constitutional majority can be rendered without my vote. In cases where my associates are equally divided, perhaps not as often as once a year, I remain silent during the argument and the consultation, but vote after a full investigation.

I rely implicitly and fearlessly on my own rectitude and on the ethical purity of all of my judicial acts and conduct. As a judge I can not permit groundless accusations to control or influence me in the performance of my public duties.

* * * * *

Motion of Appellee for a Rehearing and Leave to File Additional Brief, on the Motion of Appellants Filed Herein, to Set Aside the Orders of Court of Date January 7th, 1914, Granting a Rehearing.

1. Comes now the appellee herein and moves the court for a rehearing of the motion filed by appellants to set aside the orders of court herein of date May 17th 1913, and January 7th 1914, granting a rehearing in these actions, for the following reasons, to-wit:

184 2. After appellee- had filed their briefs herein in opposition to appellants motions to set aside the orders of May 17th 1913, and January 7th 1914, the several appellants filed additional briefs herein on the 28th day of February 1914, and appellee herein had neither time nor opportunity to file a brief in reply thereto.

3. A motion for rehearing should be granted herein because appellants have found a number of important and controlling decisions that the court herein should consider in these premises that in the hurry and press occasioned by the filing of appellants' brief heretofore mentioned could not have been found and were not known to appellee which said new matter consisted in part of the alleged law that after a judge had once withdrawn from a case that he had no right to reenter upon his duties or that the

parties had a right to his proper consideration thereof, or to his presence in the case under our constitution.

4. That in view of the importance of the several matters involved herein a full mature and careful consideration should be had upon a rehearing granted.

5. Because only three members of the court *has* set aside the order granting a rehearing herein and a constitutional majority of the court has not concurred in granting a rehearing.

6. A constitutional majority of the court granted a rehearing in this action, and a constitutional majority of the court has not concurred in denying, the motion of appellee for a rehearing.

7. Because Chief Justice Reese was qualified to sit as a judge of the court granting such order, and appellee had and now has a constitutional right to have him give due consideration to this whole case.

8. Because said order of court deprives appellee of his property without due process of law.

185 & 186 9. Because said order is prohibited by and in conflict with the Fourteenth Amendment to the Constitution of the United States and denies to appellee equal protection of law and deprives appellee of his property without due process of law.

10. Because appellants' motion to set aside the order of January 7th, 1914, granting appellees a rehearing was based solely on the ground, that the Chief Justice was disqualified from participating in said order, for the reason that he had been consulted in the suit by one of the parties, and appellants' brief in support of said motion was based solely on said proposition. Whereas, in appellants' reply brief it is urged that the Chief Justice was disqualified from participating in the order granting a rehearing, for the reason that his withdrawal from participation until after the cause had proceeded to final judgment operated as a judicial determination of his disqualification and effectually excluded him from further participation, although no facts existed constituting a disqualification, and although the Chief Justice' withdrawal was based upon a mistake of facts.

That said reply brief tendered issues not raised in appellants' motion and appellees had no opportunity of meeting the issue thus tendered.

11. The record herein discloses that when the Chief Justice withdrew from the consideration of these cases he was not in fact disqualified, but was acting under a mistake of fact that upon his discovery of the true facts it was his duty to participate in the decision of said cases. And appellee had a constitutional right to all the judges in this court sitting in *his* case.

UTICA BANK, *Appellee*,
By J. J. THOMAS,
R. S. NORVAL,
L. C. BURR,

Its Attorneys.

* * * * *

187 & 188 Supreme Court of Nebraska, January Term, A. D. 1914,
Apl. 17.

No. 17278.

UTICA BANK, Appellee,

v.

CHARLES E. YATES et al., Appellants.

Appeal from the District Court of Seward County.

This cause coming on to be heard upon motion of appellee for a rehearing and leave to file additional briefs on motion of appellants to set aside the order of the court of date January 7, 1914, granting a rehearing, was submitted to the court; upon due consideration whereof, it is by the court ordered that said motion be, and the same hereby is, overruled.

Sedgwick, J., dissenting.

J. FAWCETT,
Acting Chief Justice.

* * * * *

189-190 EXHIBIT "A." H. C. Lindsay, Clerk Supreme Court
Nebraska.

In the Supreme Court of Nebraska.

UTICA BANK, Appellee,

vs.

CHARLES E. YATES et al., Appellants.

Petition for Writ of Error.

To the Honorable Jacob Fawcett, acting Chief Justice of the Supreme
Court of Nebraska.

Your petitioner respectfully represents that in the judgment, decision, record and proceedings in the above entitled cause, which was decided and determined by the Supreme Court of the State of Nebraska, and judgment and reversal and dismissal rendered therein January 31st, 1913, and in which a motion for rehearing in said court was overruled on April 3, 1914, at which time the judgment of said court became final, which said Supreme Court of the State of Nebraska is the highest court in which a decision or judgment could be had in said action.

Your petitioner further shows that in the rendition of said judgment by said Court there was necessarily drawn in question the construction of statutes of the United States and the decision of said court was against the right, title and privileges specially set up in said suit and claimed by your petitioners under such statutes, all

of which is more particularly set forth in the assignments of error filed herewith and made a part hereof.

And whereas manifest error hath happened as appears from said judgment, decision and record and in the assignment of errors presented herewith, to the great damage of your petitioner.

Wherefore petitioner prays the allowance of a writ of error removing the record and proceedings in this suit to the Supreme Court of the United States for its revision and correction; that a citation be directed to the above named appellants for their due appearance in said Supreme Court and for supersedeas therein.

J. J. THOMAS &
L. C. BURR,
Attorneys for Appellee.

Lincoln, Nebraska, April 27, 1914.

Writ of error and citation in the within named cause allowed and ordered to issue.

JACOB FAWCETT,
*Acting Chief Justice of the
Supreme Court of Nebraska.*

[Endorsed:] 17278. Utica Bank v. Yates. Petition for Writ of error. Supreme Court of Nebraska. Filed Apr. 27, 1914. H. C. Lindsay, clerk.

191 EXHIBIT "B." H. C. Lindsay, Clerk Supreme Court Nebraska.

In the Supreme Court of Nebraska.

No. 17278.

UTICA BANK, Appellee,
vs.
CHARLES E. YATES et al. Appellants.

Assignments of Error.

Comes now the said Utica Bank, Appellee in the above named court and assigns the following as manifest error upon the face of the record, to be corrected in the Supreme Court of the United States, to which this cause is to be removed on a writ of error duly allowed for this purpose, to-wit:

1. The Supreme Court of the State of Nebraska erred in rendering the judgment in favor of appellants and in dismissing said action.

2. The Court erred in deciding that the petition of appellee did not state facts sufficient to constitute a cause of action in favor of appellee and against appellants or either of them.

3. The Court erred in deciding that "where by the federal statutes concerning national banks a responsibility is made to arise against the directors from its violation knowingly, proof of some thing more than negligence is required, and it must be shown that the violation was intentional." The correct and proper construction of said statute being "not therefore that as a condition of liability there should be proof of some thing more than recklessness,—not that there should be an intentional violation, but a violation 'in effect' intentional. There is 'in effect' an intentional violation of a statute when one deliberately refuses to examine that which it is his duty to examine."

4. The Court erred in that it has violated and disobeyed the mandate and decision of the United States Supreme Court in this case, in that, whereas by the mandate and decision of that court this case was reversed and remanded for further proceedings not inconsistent with the decision and opinion of said United States Supreme Court, the proceedings, decision, opinions and judgment in this case in this court are in direct conflict and inconsistent with the opinion and decision of the United States Supreme Court and in violation and disobedience of its mandate; that this court has placed a construction and interpretation upon Section 5239 Revised Statutes of the United States—in conflict with and opposition to the decision of the United States Supreme Court in this case, and as a result thereof appellee has been denied a right especially set up and claimed under sections 5211 and 5239, Revised Statutes of the United States.

5. The Court erred in deciding that in order to sustain an action against appellants for making and publishing false statements of the financial condition of the bank in their reports made and published pursuant to the order and command of the Comptroller of the Currency, it was necessary that such false statements should be made with "personal knowledge of their falsity."

6. The Court erred in deciding that in order to bring appellants within the rule of liability announced by the Supreme Court of the United States in this case, it was necessary that such defendants should have had personal knowledge of the falsity of their reports.

192 7. The Court erred in finding and deciding that the evidence in the record is not sufficient to sustain appellee's judgment against appellants and each of them, under sections 5211 and 5239 Revised Statutes of the United States.

8. The Court erred in finding and deciding that the evidence in the record is insufficient to charge appellants with having knowingly made and published false statements of the financial condition of the Capital National Bank, or with knowingly permitting the officers, agents or servants of said Bank to make and publish such false statements, or with participating in or consenting thereto.

9. The Court erred in deciding that the provision of section 5239 Revised Statutes of the United States, are exclusive of the common law action for fraud and deceit as to false statements and representations of the financial condition of a national bank, made

voluntarily and wholly outside of the requirements of the national banking act and not pursuant to the call of the Comptroller of the Currency or other proper official.

10. The Court erred in deciding that appellee's petition is insufficient to state a cause of action at the common law for fraud and deceit, or that the decision of the United States Supreme Court in this case, so decided.

11. The Court erred in deciding that the evidence in the record is insufficient to sustain appellee's judgment against appellants and each of them, because its decision is based upon an erroneous interpretation and construction of section 5239 Revised Statutes of the United States, and the decision of the United States Supreme Court in this case, in that it has assumed that in order to sustain recovery it must appear that appellant directors had personal knowledge of the falsity of their statements—"that knowledge must be brought home to the director that he is deceiving the individual wronged and may thereby occasion a loss to him"—or that the director must personally participate in the act complained of.

By reason of said erroneous decision appellee has been denied a right specially set up and claimed under said Section 5239 Revised Statutes United States.

12. The Court erred in not deciding that after receiving the letters from the Comptroller of the Currency, shown by the record it was the duty of appellant directors to enter upon some reasonable examination and investigation of the affairs and financial condition of the Bank; and that their deliberate refusal or failure to so do, constituted "in effect" an intentional violation of Section 5239 Revised Statutes United States; and if, without so doing, they thereafter make false statements of its financial condition, or permit any of its officers, agents or servants to make the same, or if they assent thereto, they become liable in their individual capacity under Section 5239, Revised Statutes of the United States to depositors of the Bank for all damages sustained in consequence of such violation, even if they did not know the statements to be false.

13. The Court erred in not deciding that where a director of a national bank, through his own recklessness or deliberate disregard of duty, is wholly ignorant of the affairs and financial condition of the bank, and conscious of his ignorance, makes or attests a statement of its financial condition, without knowing whether it be true or false, and it is actually false and untrue, he is guilty of a false representation, knowingly made, and liable under section 5239 Revised Statutes of the United States.

14. The Court erred in deciding that appellants Yates and Hamer did not knowingly violate any of the provisions of section 5239 Revised Statutes of the United States, although they each attested published reports of the financial condition of the Capital National Bank which were admittedly false and untrue, after receiving the letters from the Comptroller of the Currency shown in the record.

15. The Court erred in deciding that the appellants and each of them did not knowingly violate any of the provisions of section 5239, Revised Statutes of the United States, although they

each permitted the officers, agent- and servants of the Capital National Bank to make and publish false statements of its financial condition, and assented to and acquiesced in the same, after receiving the letters from the Comptroller of the Currency shown in the record.

16. The Court erred in not deciding that where a director of a national banking association, who has paid no attention to its affairs and is ignorant of its financial condition, makes or attests a statement of such condition, in which he represents a material fact to be true to his personal knowledge, as distinguished from belief or opinion, when he does not know whether it is true or false, and it is actually untrue, he is guilty of a falsehood, knowingly made, even if he believed it to be true. That after receiving the letters from the Comptroller of the Currency, shown by the record, it was his duty to enter upon the discharge of his duty and acquaint himself with the affairs of the association and that his failure to so do is gross negligence and recklessness or a deliberate refusal to perform such duty and constitutes an intentional violation of Section 5239, Revised Statutes of the United States.

And if thereafter he makes or attests statements of its financial condition or permits its officers, agents or servants to do so, and such statements are in fact false and untrue, he is liable under section 5239 Revised Statutes of the United States in his personal fact of the trial court in this case, appellee's judgment should have suffered in consequence of such false representation, regardless of whether or not said director had actual personal knowledge of its falsity.

17. The Court erred in not deciding that under the findings of fact of the trial court in this case, appellee's judgment should have been affirmed.

18. The Court erred in not deciding that the findings of fact of the trial court contain every element necessary to sustain appellee's judgment, under Section 5239 Revised Statutes of the United States, and as such are supported by the evidence.

19. The Court erred in deciding that in order to incur liability under section 5239 Revised Statutes of the United States for the making or attesting of a false statement of the financial condition of a national banking association, it is necessary that the one making or attesting such statement should have actual personal knowledge of the falsity thereof.

20. The Court erred in not deciding that by their attestation of the official published report shown by the record, the appellant directors affirmed and represented they had actual knowledge of the financial condition of the bank and of the truthfulness of said statement, and if they made the same recklessly, without knowledge of its truth or falsity, or conscious that they had no knowledge of its truthfulness, they are guilty of a false representation in effect knowingly made and liable under Section 5239 Revised Statutes of the United States.

21. The court erred in deciding that the allegations of appellee's

petition are insufficient to sustain the judgment against appellants under Section 5239 Revised Statutes of the United States.

22. The Judgment of reversal and dismissal is erroneous because the opinion of Hamer J. as to the findings of fact is not concurred in by a constitutional majority of all the elected and qualified judges of this court,—Letton J. having only concurred on the law—and therefore the findings of fact of the trial court have not been reversed or modified but stand approved and affirmed by this court.

23. The Court erred in reversing appellee's judgment and dismissing the case because the judgment is not concurred in and supported by a majority of the duly elected and qualified judges of this court as provided in Article VI. Section 2, of the Constitution of the State of Nebraska—whereby appellee has been deprived of his property without due process of law and denied the equal protection of the laws, all of which is prohibited by and in conflict with the 14th amendment to the constitution of the United States.

This court still had jurisdiction of this case at the time it came on for final determination on appellee's motion for a rehearing and when the final order was made herein, there was not a majority of the court who were in favor of or concurred in the reversal and dismissal of this case.

24. The Court erred in not deciding that appellee's petition states a cause of action against appellants whether attested by the requirements of the national banking act or the common law action for fraud and deceit, and in assuming that the United States Supreme Court decided appellee's petition did not state facts sufficient to constitute a cause of action at the common law for fraud and deceit.

25. Your petitioner further shows that in the rendition of said judgment by said court—

There was drawn in question the validity of an authority exercised under the United States, and the decision of said court was against its validity.

There was necessarily drawn in question the construction and application of the Statutes of the United States and the decision of said court was against the right, title, and privileges especially set up in said suit and claimed by appellee under said Statutes.

Wherefore appellee prays that the judgment of this court may be set aside and reversed and that the judgment rendered in its favor in the District Court of Seward County be affirmed.

J. J. THOMAS &

L. C. BURR,

Attorneys for Appellee.

[Endorsed:] 17278. Utica Bank v. Yates. Assignments of errors. Supreme Court of Nebraska. Filed Apr. 27, 1914. H. C. Lindsay, Clerk.

195-205 And on the same day there was rendered by said Supreme Court and entered of record upon the journal thereof a certain Order, in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1914, Apl. 27.

No. 17278.

UTICA BANK, Appellee,
vs.
CHARLES E. YATES et al., Appellants.

Appeal from the District Court of Seward County.

This cause coming on to be heard upon the assignments of error and petition for writ of error to the Supreme Court of the United States, by Utica Bank, appellee herein, was submitted to the court; upon due consideration whereof, it is by the court ordered that a writ of error removing the record and proceedings in said suit to the Supreme Court of the United States be allowed, and that a citation be directed to Charles E. Yates and Louisa Hamer, administratrix of the estate of Ellis P. Hamer, deceased, appellants herein for their appearance in said Supreme Court of the United States.

J. FAWCETT,
Acting Chief Justice.

* * * * *

206 Rec'd copy of within designation this 21st day of August,
1914.

In the Supreme Court of the United States.

October Term, 1914, No. 503.

File No. 22,242.

UTICA BANK, Plaintiff in Error,
vs.
CHARLES E. YATES and LOUISA HAMER, Administratrix of the Estate
of Ellis P. Hamer, Deceased, Defendants in Error.

Designation for Printing.

The plaintiff in error in the above-entitled case intends to rely on the assignments of error contained in the record, and requests the Clerk of the Supreme Court of the United States to print the following portions of the transcript of the record, which he thinks necessary for the consideration of such errors:

1. Transcript page 1. All of page.
2. Transcript page 5; amended petition, commencing at top of page (omitting first two lines), and ending with the signature of attorneys on page 15.

3. Transcript page 16: Exhibits A and B, commencing with the words "Exhibit A," and ending with the signature of directors, near top of page 19.

4. Transcript page 20: answer of Yates and Hamer, commencing with the words "in the District Court of Seward County, Nebraska," and ending with the signatures of attorneys on page 25.

207 5. Transcript page 26: reply of plaintiff, commencing with the words "in the District Court of Seward County, Nebraska," and ending with the signature of attorneys on same page.

6. Transcript page 27: stipulation, commencing with the word "stipulation," on third line from bottom of page, and ending with signature of attorneys on page 29.

7. Transcript page 33: requests for special findings, commencing with the words "in the District Court of Seward County, Nebraska," and ending with the signature of attorney on page 37.

8. Transcript page 37: Waiver of jury; remainder of page.

9. Transcript page 41: Leave to amend petition by interlineation, commencing with the last two lines on bottom of page and ending with the first six lines at top of page 42.

10. Transcript page 44: special findings, commencing with the words "in the District Court of Seward County, Nebraska," and ending with the signature "B. F. Good, Judge," at top of page 46.

11. Transcript page 54: Motion to amend answer, commencing with the first line at bottom of page, and ending with signature of attorneys, near top of page 57.

12. Transcript page 57: Yates' motion for new trial commencing with the words "the defendant, Charles E. Yates, moves the court," and ending with the signature of attorney at page 65.

13. Transcript page 65: Hamer's motion for new trial, commencing with third line from bottom of page and ending with signature of attorney on page 73.

14. Transcript page 73: findings and judgment, commencing with the words "and now on this 8th day of May, 1911," and ending at the bottom of page 76, but omitting the last line.

15. Transcript page 92: Judgment of reversal, commencing with the words "and afterwards, to wit, on the 31st day of January, 1913," and ending with the signature "J. Fawcett, Acting Chief Justice," on page 93.

16. Transcript page 94: Opinions of Hamer and Letton, JJ., commencing at top of page and ending at bottom of page 108.

17. Transcript page 109: motion for rehearing, commencing with the words "appellee's motion for rehearing," and ending with the signatures of attorneys near bottom of page 117.

18. Transcript page 120: Opinions of Sedgwick, J., commencing at top of page and ending with page 127.

19. Transcript page 130: Order granting rehearing, commencing with the words "and afterwards, to wit," and ending at bottom of page.

20. Transcript page 131: commencing with the words "Hamer,

Rose and Barnes, JJ. dissent," and ending with the signature "J. Fawcett, Acting Chief Justice," on same page.

21. Transcript page 132: Motion to vacate order for rehearing, commencing with the words "the appellants, Charles E. Yates," and ending with the signature of attorneys at bottom of page 135.

209 22. Transcript page 143: statement of Reese, C. J., commencing at top of page and ending with the words "matters, as above stated," near top of page 146.

23. Transcript page 164: extending time to file briefs, commencing with the words "these causes coming on to be heard," and ending with the signature of the chief justice on the same page.

24. Transcript page 177: order granting rehearing, and opinions of Sedgwick, Barnes and Rose, JJ., commencing at top of page 177 and ending with the words "in the performance of my public duties," near top of page 183. (omitting title to cases).

25. Transcript page 183: Motion for rehearing, commencing with the words "motion of appellee for rehearing," and ending with the signature of attorneys at bottom of page 185.

26. Trans. p. 187. Order overruling request for rehearing, commencing with the words "Supreme Court of Nebraska," and ending with signature of "J. Fawcett, Acting Chief Justice," at bottom of same page.

27. Transcript page 189: Petition for writ of error. All of page.

28. Transcript page 191: Assignments of error, commencing at top of page and ending at bottom of page 194.

29. Transcript page 195: Allowance of writ of error, commencing at top of page and ending with the signature "J. Fawcett, Acting Chief Justice," on same page.

UTICA BANK,

Plff in Error.

By L. C. BURR &

J. J. THOMAS,

Att'ys.

210 STATE OF NEBRASKA,
Seward County, ss:

J. J. Thomas being first duly sworn deposes and says that on the 21st day of August, 1914 he served a copy of the annexed designation for printing on the defendants in error, Charles E. Yates and Louisa P. Hamer, administratrix by leaving a true and correct copy thereof at the office of Bishop & Hall, a partnership composed of Frank M. Hall and Frank E. Bishop at the First National Bank Building in Lincoln, Nebraska, with their stenographer and employee.

Affiant avers that he was unable to make personal service upon either of the members of said firm for the reason that the said Hall was in the City of Chicago and the said Bishop somewhere in the Dominion of Canada.

J. J. THOMAS.

Subscribed in my presence and sworn to before me this 22d day of August, 1914.

[Notarial Seal S. C. Stoner, Seward County, Nebraska. Commission expires Oct. 8, 1918.]

S. C. STONER,
Notary Public.

211 [Endorsed:] 503/24242. In the Supreme Court of the United States. Utica Bank, pl'ff in error, v. Charles E. Yates, et al., def'ts in error. File No. 24,242. Oct. Term 1914. No. 503. Designation for printing. L. C. Burr, J. J. Thomas, att'ys for pl'ff in error.

212 [Endorsed:] File No. 24,242. Supreme Court U. S. October term, 1914. Term No. 503. Utica Bank, plaintiff in error vs. Charles E. Yates, et al. Designation by plaintiff in error of parts of record to be printed, with proof of service of same. Filed August 25th, 1914.

Endorsed on cover: File No. 24,242. Nebraska Supreme Court. Term No. 503. Utica Bank, plaintiff in error v. Charles E. Yates and Louisa Hamer, administratrix of the estate of Ellis P. Hamer, deceased. Filed May 26th, 1914. File No. 24,242.

4

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915

No.  166

THOMAS BAILEY, PLAINTIFF IN ERROR,

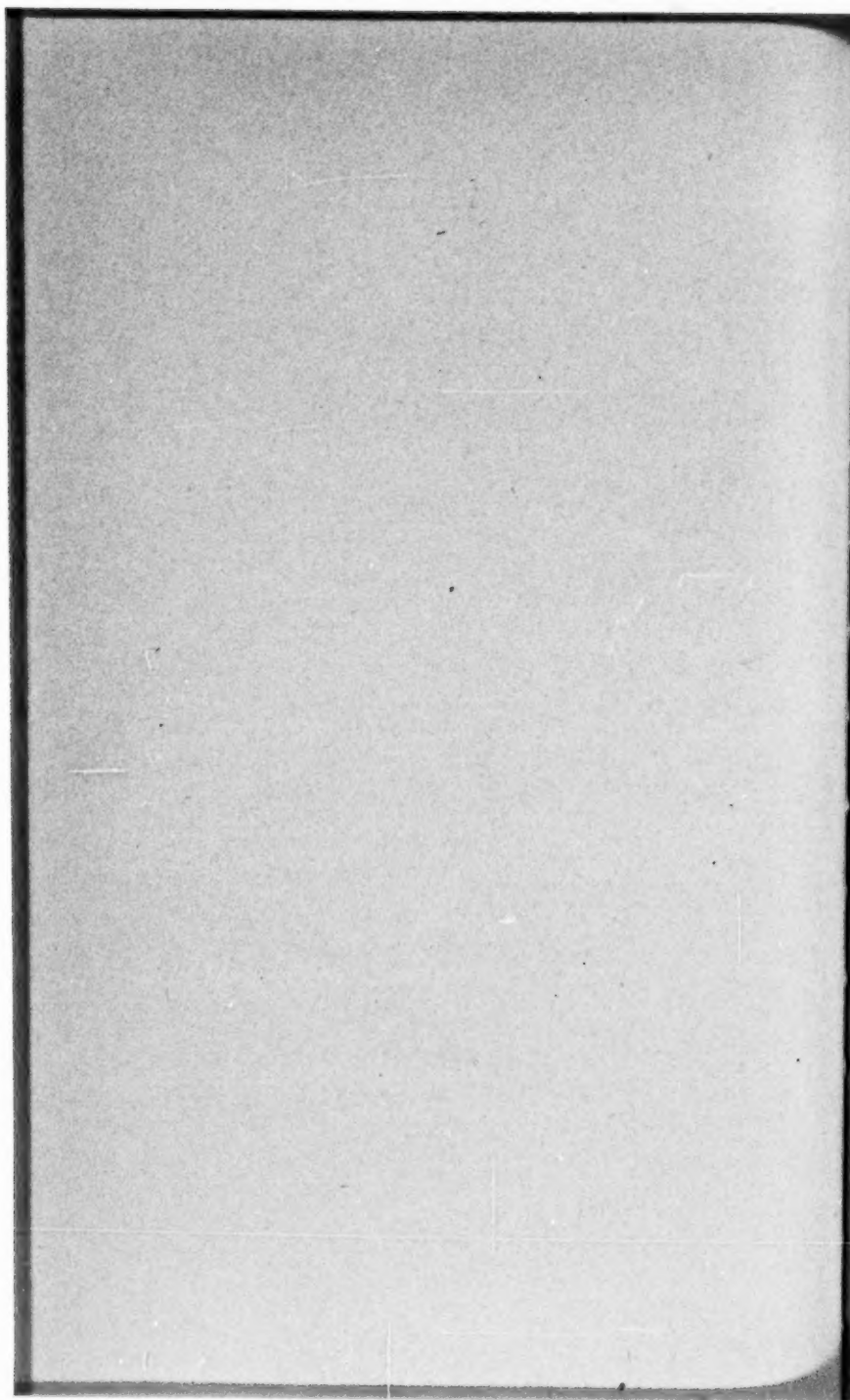
vs.

CHARLES E. YATES AND LOUISA HAMER, ADMINISTRA-
TRIX OF THE ESTATE OF ELLIS P. HAMER, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

FILED MAY 26, 1914.

(24,243)



(24,243)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 504.

THOMAS BAILEY, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES AND LOUISA HAMER, ADMINISTRATRIX OF THE ESTATE OF ELLIS P. HAMER, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

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No. 17279.

1-5

BAILEY
vs.
YATES.

Pleas Before the Supreme Court of the State of Nebraska, at a Term thereof Begun and Holden at the Capitol, in the City of Lincoln, in said State, on the 6th Day of January, 1914.

Present:

Hon. Manoah B. Reese, Chief Justice.
Hon. John B. Barnes, Judge.
Hon. Charles B. Letton, Judge.
Hon. Jacob Fawcett, Judge.
Hon. William Rose, Judge.
Hon. Samuel H. Sedgwick, Judge.
Hon. Francis G. Hamer, Judge.

Attest:

H. C. LINDSAY, *Clerk*.

Be it remembered, That on the 5th day of August, 1911, there was filed in the office of the clerk of said supreme court, a certain Praecipe, in the words and figures following, to-wit.

* * * * *

6 Afterwards, on the 16th day of March, A. D., 1899, there was filed herein a certain Amended Petition, in words and figures following to-wit:

In the District Court of Seward County, Nebraska.

THOMAS BAILEY, Plaintiff,

vs.

CHARLES W. MOSHER, HOMAN J. WALSH, CHARLES E. YATES, ELLIS P. HAMER, Ambrose P. S. Stuart, Richard C. Outcalt, and Rollo O. Phillips, Defendants.

Amended Petition.

The plaintiff for his amended petition complains of the defendants and alleges that on, prior and subsequent to the 9th day of December, 1892, and at the several times hereinafter mentioned the defendants acted as the directors and officers of the Capital National Bank; a corporation duly organized and doing a general banking business in the City of Lincoln, Nebraska, and as such directors had the full control and management of said Bank.

7 That acting as such directors and officers of said Bank, it became and was the duty of the defendants and each of them under the law as well as the by-laws of said Bank to actively and actually manage and superintend the business of the same, to examine the books of said Bank including loans and discounts, to examine the loans made, to whom made, the security therefor, and when due; to see that the general condition of said Bank corresponded with its books, to see that the resources and liabilities of said Bank corresponded with the books of said Bank, to see that all notes and bills receivable held by said bank and entered upon its books and in its statements as valuable assets were in fact good valuable and collectable, and to see that all such as were worthless or of little or no value were charged off from the assets of said Bank and not included in its statements, to see that the valuable effects, assets and other matters including the cash on hand and in other banks or depositories agreed with the books of said Bank.

That the defendants and each of them failed to perform the aforesaid duties and each and all of them imposed upon them by law, and by the by-laws of said Bank, and by reason of such failure large loans were made by the Bank to insolvent persons upon inadequate or no security, and to its officers and to those who were relatives and favorites of the defendants as officers or acting officers of the Bank.

That the books of said Bank were out of Balance that they allowed and permitted forced balances to be made and carried on the Bank books the deposit account was falsified being greatly under stated, the real estate, bills receivable, and deposit account each being largely inflated, that they permitted to be carried on the books of the Bank and permitted and caused to be printed published statements
8 and advertisements, wherein they included as valuable assets of the Bank large and numerous notes and bills receivable from persons as due and owing to the Bank from persons who were worthless and irresponsible, and also included in their statements of the resources and liabilities of said Bank, and also upon its books as good and valuable, numerous notes, bills receivable and other resources in large amounts that were either wholly worthless or of little or no value, and also permitted large amounts of notes, bills receivable and other items, due the Bank to remain past or over-due without taking steps to collect or secure the same, whereby the same were lost to the Bank and became and were entirely worthless; and they permitted and continued from time to time to carry such worthless and valueless notes, bills receivable, and other assets upon the books of said Bank as a part of its valuable and available assets when they knew, or should by proper diligence and examination have known the same to be wholly worthless, and of no value, and from time to time they published permitted, allowed and caused to be published to the public and informed and represented to plaintiff in the numerous statements made by them to plaintiff that such notes, bills receivable, and other worthless assets were good and collectable and part of the valuable resources and effects of said Bank when in truth and in

fact they knew and were in duty bound to know said statements and each and all of them to be false and utterly untrue; that the resources of said Bank were largely inflated and the liabilities thereof largely shrunken, and the published statements and advertisements and the books of the Bank did not show its true condition in this that the Bank by its books and the published statements and advertisements showed that it was in good sound financial condition when it was in truth and in fact in an insolvent condition, and was

9 and had been in an insolvent condition since and prior to December 9th, 1892, and that such insolvency resulted from the careless and negligent manner in which the defendants acting as such directors and officers managed and superintended the Bank and *and* its said business, and all of which facts and circumstances the defendants and each of them, had full knowledge and it was the duty of each of them under the law to so know and inform themselves regarding the true condition of said Bank.

That after said Bank became insolvent as aforesaid the defendants made, caused, allowed and permitted to be made statements to the plaintiff and the public showing said Bank to be solvent, its capital stock unimpaired, and a surplus on hand, and so continued to publish, cause, allow and permit to be published said statements showing it in the condition aforesaid until it closed its doors and ceased doing business on January 21st, 1893.

That after the insolvency aforesaid it continued to pay out large semi-annual dividends on its stock of from 4 to 8 per cent until within a short time of its closing its doors as aforesaid and ceasing to do business.

That after said Bank became insolvent as aforesaid the said defendants permitted said Bank to continue in business and receive deposits and loans from plaintiff and others, the defendants having knowledge of such insolvency, or ought to have known, and could have known by the exercise of ordinary care in the discharge of their duties as directors or acting as directors and of the insolvency of said Bank this plaintiff was at all times entirely ignorant.

10 That while said Bank was insolvent as aforesaid the defendants negligently and fraudulently caused and permitted advertisements and statements to be made and published in the Lincoln, Nebraska, daily and weekly newspapers, setting forth the solvency of said Bank for the purpose of inducing plaintiff and others, and the public generally, to loan, deposit and keep money in said Bank, and the plaintiff relying upon said published statements as it had the right to do, deposited and loaned his money to said Bank as hereinafter stated.

That if it had not been for such false statements aforesaid and for these hereinafter set forth this plaintiff would not have deposited and loaned any money to said Bank as he did from time to time as hereafter set forth, nor would he have allowed the same to remain therein, but on account of the false statements referred to aforesaid he allowed the same to remain on deposit, when but for said false and untrue statements he would have promptly withdrawn his loans and deposits before the failure of said Bank, and that he was pre-

vented from so doing by reason of said false and untrue statements aforesaid showing said Bank to be in a good, sound, financial, condition and solvent, when in truth and in fact it was not in a good sound financial condition, but was wholly and utterly insolvent.

That on the 9th day of December, 1892, said Bank being insolvent as aforesaid, the defendants for the purpose of inducing the plaintiff and others to do and continue business with and to loan and deposit money with said Bank made, caused allowed and permitted a false statement of the condition of said Bank, and its resources and liabilities, which said statement is hereto attached and

11 marked "Exhibit A" which said statement was made, caused, allowed and permitted to be made by the said defendants as such directors and officers of said Bank for the purpose of deceiving the plaintiff and others and induce the plaintiff and others to do and continue doing business with said Bank as aforesaid, and said defendants on said date caused allowed and permitted said false statements to be published in the newspapers of general circulation in Lincoln, Nebraska, and which said papers were of general circulation in the State of Nebraska.

Plaintiff avers that on the 28th day of December, 1886, the said defendants and each of them acting as such directors and officers of said Bank for the purpose of deceiving the plaintiff and others and for the purpose of inducing the plaintiff and others to believe said Bank sound, solid, and solvent, and to induce the plaintiff and others to do business with said Bank aforesaid made, caused, allowed and permitted to be made a false statement of its resources and liabilities, a copy of which statement is hereto attached and marked "Exhibit B" and caused, allowed and permitted said statements to be published in various newspapers in general circulation in the City of Lincoln, Nebraska, which said newspapers were of general circulation in the State of Nebraska for the purpose and with the intent to induce this plaintiff and others to loan money and deposit money with said Bank when in truth and in fact said Bank was not in a sound, solid, and solvent condition, but *a* was wholly insolvent.

This plaintiff avers that on and between January 3rd, 1887 and January 21st, 1893, the defendants with the fraudulent intent and purpose as aforesaid during all of said time made, allowed, caused and permitted to be made at divers intervals false statements of the condition of said Bank as to its resources and liabilities

12 with the intent and purpose of deceiving the plaintiff and others as aforesaid and caused, acquiesced in, allowed and permitted said false statements and each of them severally to be published in the newspapers of general circulation of the City of Lincoln, Nebraska, which said papers aforesaid were of general circulation in the State of Nebraska.

And plaintiff avers that said statements and each of them showed, and the defendants in each of said statements, and by said statements represented that said Bank was in a thoroughly sound, safe and solvent condition and was doing a prosperous business and was in all respects a safe and secure institution with which to do business and a safe Bank in which to make deposits and loans of money and

said statements were prepared and published and were caused permitted and allowed to be prepared and published by said defendants for the purpose of making it appear to this plaintiff and others that said Bank was sound, safe and solvent, and thereby inducing this plaintiff and others to believe and rely on said statements as aforesaid; that said statements and each of them as made and published stating the resources and liabilities of said Bank as aforesaid, were read and looked over by the plaintiff, and plaintiff avers that he believed them to be true and correct statements of the condition and resources of said Bank, and that during said period of time,—the exact time of which plaintiff cannot at this time state,—the said defendants had conversations with plaintiff as aforesaid at divers times and during the time when said published statements were made as aforesaid between July 23rd, 1884 and January 21st, 1893, in which said conversations said defendants represented said Bank,

13 of which they were directors and acting directors and officers was thoroughly safe and sound, and believing said published statements and advertisements as *as* aforesaid and said verbal representations so made by said defendants to be true, and believing them to be true and relying upon the same, that said Bank was sound, solid, and solvent, and doing a flourishing and prosperous business as said statements and advertisements showed, and represented as in said verbal statements, this plaintiff on the 11th day of October, 1892, loaned to and deposited with said Bank, of which defendants were the directors and acting directors and officers a sum of money and continued to loan and deposit with said Bank from said date from time to time large sums of money up to and including the 21st day of January, 1893, and plaintiff avers that on the 1st day of January, 1893, plaintiff had a balance to his credit in said Bank amounting to Eleven Thousand Five Hundred (\$11,500) Dollars money he had loaned to and deposited with said Bank.

That plaintiff loaned and deposited in said Bank the following sums and amounts upon the following dates, to-wit:

October 11th, 1892	\$500.00
" 11th, "	1000.00
" 11th, "	8000.00
December 28th, "	500.00
" 28th, "	500.00
" 28th, "	1000.00

Plaintiff avers that said statements and advertisements so published as aforesaid and said statements as verbally announced to the plaintiff, were, as the defendants and each of them well knew, and were in duty bound to know grossly exaggerated and wholly false and untrue and that the liabilities of said Bank were in each

14 of said statements and advertisements grossly misstated, and the resources inflated and exaggerated as hereinbefore stated.

That whereas said statements and advertisements and each of them as well as verbal statements made, and caused allowed and permitted to be made to the plaintiff as aforesaid showed that said Bank was sound solid and solvent and doing a flourishing business, when in

truth and in fact said Bank was not doing a flourishing and prosperous business and was in fact at the time said statements and advertisements were published and verbally made, in an unsafe precarious condition and at the time of the last published statement as aforesaid, and for a long time prior thereto, was in fact insolvent and could not pay the money owing plaintiff and others.

That the true condition of said Bank was well known to said defendants at the several times they made statements and advertisements as published and as verbally made to the plaintiff, but notwithstanding they knew its unsafe and insolvent condition and had full access to its books and accounts and were in a position to know, and it was their duty to know the true condition of said Bank, and they and each of them should and could have known its true condition by the exercise of ordinary care in the discharge of their duties as directors and acting as directors and they each of them willfully negligently and recklessly for the purpose and with the intent aforesaid made, caused, allowed and permitted to be made, and published said false statements and advertisements and verbal false statements as hereinbefore set forth for the purpose of inducing the plaintiff and others to do business with and make loans to and deposit money in said Bank.

Plaintiff further avers that his knowledge of the condition
15 of said Bank was wholly derived from said published statements and advertisements and by said verbal statements so made to him by said defendants and that had said statements and advertisements so published and as verbally made as aforesaid set out given the true condition of said Bank, it would have appeared, and it would have been shown that said Bank was not sound, solid, and solvent, and that it was not a safe institution in which to do business, and the plaintiff would not have made said loans and deposits with said Bank.

Plaintiff avers that after making said loans and deposits with said Bank, which were each and all made by plaintiff relying upon said statements and advertisements as aforesaid, to-wit:—on the 21st day of January, 1893, said Bank suspended business and went into the hands of a Receiver, and that said Bank then was, and had been for many years prior thereto and at the time of publishing said statements and advertisements and making said verbal statements by said defendants to the plaintiff as aforesaid insolvent, and unable to meet its obligations, and could not pay its debts, and did not have the assets and resources that said defendants represented it had, in said statements, advertisements, and verbal statements, made as aforesaid, and that by reason thereof said Bank could not and did not pay this plaintiff any part of said sum of money loaned and deposited with said Bank, except, the sum of Seventeen Hundred and Twenty-five and no/100 (\$1,725) Dollars, and the remainder of said money so loaned and deposited with said Bank has been wholly lost
to this plaintiff by reason of the facts hereinbefore set forth.

16 Plaintiff states that by reason of the facts as above set forth and the false and fraudulent statements, advertisements, and representations of the defendant the plaintiff has been damaged in the sum of Fifteen Thousand (\$15,000.00) Dollars.

Wherefore, plaintiff prays judgment against the defendants and each of them for the sum of Fifteen Thousand (\$15,000) Dollars, its damages with interest thereon from January 21st, 1893, at 7 per cent and costs of suit.

THOMAS BAILEY,

Plaintiff,

By BURR & BURR &

GEO. W. LOWLY,

BIGGS & THOMAS,

His Attorneys.

* * * * *

17

"EXHIBIT A."

Report of the Condition of the Capital National Bank at Lincoln, in the State of Nebraska, at the Close of Business December 9, 1892.

Resources.

Loans and discounts	768,601.44
Overdrafts secured and unsecured	6,217.74
United States Bonds to secure circulation	50,000.00
Stocks, securities, ect.	325.00
Due from approved reserve agents	107,090.01
Due from other National Banks	17,800.33
Due from State Banks and Bankers	5,394.72
Banking house furniture and fixtures	5,770.00
Other real estate and mortgages owned	38,716.92
Current expenses and taxes paid	14,286.28
Checks and other cash items	3,698.56
Exchange for clearing house	8,841.16
Bills of other banks	2,355.00
Fractional paper currency, nickels and cents	298.71
Specie	26,789.50
Legal tender notes	17,431.00
Redemption fund with United States Treasurer (5 per cent of circulation)	1,350.00
Total	\$1,074,867.37

18

Liabilities.

Capital stock paid in	300,000.00
Surplus funds	6,000.00
Undivided profits	21,180.75
National Bank notes outstanding	45,000.00
Individual deposits subject to check.... \$356,139.33	
Demand certificates of deposit	158,545.14
Due to other National Banks	81,574.14
Due to State Banks and Bankers	47,372.89
	643,632.24
Notes and bills rediscounted	59,054.38
Total	\$1,074,867.37

STATE OF NEBRASKA,
County of Lancaster, ss:

I, R. C. Outcalt, Cashier of the above named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

R. C. OUTCALT, *Cashier.*

Subscribed and sworn to before me this 15th day of December, 1892.

HAL C. YOUNG,
Notary Public.

Correct—Attest:

C. W. MOSHER,
C. E. YATES,
R. O. PHILLIPS,
Directors.

19

"EXHIBIT B."

Report of the Condition of the Capital National Bank at Lincoln, in the State of Nebraska, at the Close of Business December 28th, 1886.

Resources.

Loans and discounts	737,462.12
Overdrafts	3,974.33
U. S. Bonds to secure circulation	50,000.00
Other stock, bonds and mortgages	22,739.34
Due from approved reserve agents	74,068.63
Due from other National Banks	56,215.29
Due from State Banks and Bankers	10,495.36
Real estate, furniture and fixtures	7,177.33
Current expenses and taxes paid	8,885.65
Premiums paid	7,188.43
Checks and other Cash items	13,742.02
Bills of other Banks	3,712.00
Fractional paper currency, nickels and cents	216.42
Specie	27,308.00
Legal tender notes	10,400.00
Redemption with U. S. Treasurer (5% circulation) ..	1,900.00
Total	\$1,035,448.92

20 & 21

Liabilities.

Capital stock paid in	300,000.00
Surplus funds	12,000.00
Undivided profits	28,439.38
National bank notes outstanding	45,000.00

Individual deposits subject to check	\$414,962.35	
Demand certificates of deposit	40,859.66	
Due to other National banks	107,648.27	
Due to State Banks and Bankers	37,448.66	
		597,918.94
Notes and bills rediscounted		52,090.60
Total		\$1,035,448.92

STATE OF NEBRASKA,

Lancaster County, ss:

I, C. W. Mosher, President of the above Bank do solemnly swear that the above statement is true to the best of my knowledge and belief.

C. W. MOSHER, *President*.

Subscribed in my presence and sworn to before me this 11th day of October, 1886.

E. R. SMITH, *N. P.*

Correct—Attest:

C. W. MOSHER,

C. E. YATES,

D. E. THOMPSON,

Directors.

* * * * *

22 Now come the defendants Charles E. Yates and Ellis P. Hamer, and in obedience to the order of the Court, each makes answer for himself separately to the plaintiff's petition as amended by interconnection on the 16th day of March 1899.

These defendants say that whether the plaintiff made the deposits in the Capital National Bank of Lincoln at the times and in the amounts stated in said petition, these defendants have not knowledge or information, and they therefore deny that such deposits were made.

23 First Defense. These defendants each for himself alleges that the Capital National Bank of Lincoln, referred to in said amended petition, was organized and had its existence under and by virtue of the national banking act passed and approved by the congress of the United States. That Homan J. Walsh was the vice-president of said bank and Richard C. Outcalt was the cashier of said bank, and that each of the other defendants was a director of said bank. That said bank was closed by the national bank examiner on or about the 23rd day of January, 1893, and that soon after said date a receiver was duly appointed by the Comptroller of the Currency to take charge of said bank and wind up its affairs, collect its assets and distribute the proceeds to the creditors and stockholders; and said bank has been in the hands and control of a receiver ever since said appointment.

That no forfeiture of the franchise of the said banking association has ever been declared by the Comptroller of the Currency or

adjudged by any court for reason of the violation of any of the provisions of the national banking act by the directors and officers of said bank, or for any other reason.

That the duties and obligations of the directors of said bank were such and only such as were required by the national banking act under which said bank was organized and existing.

These defendants deny that they signed or attested the reports set out and referred to in the said amended petition, and deny that they made, signed or attested any report purporting to show the condition of said Bank for the purposes and in the manner alleged in the plaintiff's said amended petition.

These defendants further say that the cause of action set
24 out in the plaintiff's amended petition, if he have any, is founded upon alleged facts, which, if true, constituted a violation by these defendants as directors, of their duties as such directors as laid down and defined in the national banking laws of the United States above referred to concerning the government and management of national banks. And these defendants allege that if any liability attaches to them or either of them as directors of said bank for any act done or duty neglected as set forth in the said amended petition or otherwise, that such liability is determined and controlled by the national banking act concerning the management of national banks; and that in determining the liability of these defendants or either of them, there is necessarily involved the construction of said national banking act relating to the duties of directors of national banks. That a federal question is involved in determining the liability of these defendants by reason of the alleged mismanagement of said bank and the alleged neglect of duty on the part of these defendants.

These defendants further answering, each for himself, denies each and every allegation in the plaintiff's petition, except as hereinbefore stated or admitted.

Second Defense. These defendants further say, each for himself, that the plaintiff on or about the 27th day of October 1893, brought an action against these same defendants in the District Court of Lancaster County, Nebraska, on the same cause of action as now set out in the plaintiff's amended petition, and that a removal of said cause of action from the Lancaster County District Court to the United States Circuit Court for the District of Nebraska was duly

made and after the filing of said cause of action in the said
25 United States Court on removal, a motion was duly made by the plaintiff, Thomas Bailey, to remand said cause to the District Court from which it had been removed, and which motion was overruled.

That subsequently, and on or about February 9th, 1894, these defendants, together with the other defendants in said cause then pending in the said United States Circuit Court, filed demurrers to the petition of the said plaintiff, which on consideration of the court were sustained and a judgment was duly entered in favor of the said defendants for costs, amounting to the sum of \$125.73; and the plaintiff's cause of action was dismissed by the said court.

That subsequently, and on or about the 13th day of February

1894, the plaintiff in said action, being the same plaintiff as in this action, sued out a writ of error and took an appeal from the ruling and judgment entered by the said Circuit Court of the United States, to the United States Circuit Court of Appeals.

That such proceedings were had on the application of the plaintiff in said Circuit Court of Appeals for a reversal of the said judgment as are necessary to obtain a hearing in said Circuit Court of Appeals, and that a hearing was duly had and an opinion and judgment rendered affirming the judgment of the Circuit Court of the United States in said case; said judgment of affirmance being duly entered in the said Court of Appeals on or about the 10th day of November 1894, and adjudging also that the said plaintiff pay the costs incurred in the said appeal, amounting to the sum of \$72.25.

These defendants further say that said judgments entered in the said Circuit Court of the United States for the District of Nebraska and in the United States Circuit Court of Appeals in said cause, have never been set aside or appealed from, and they stand of record in full force and effect as a final adjudication of the plaintiff's
26 cause of action against these defendants.

These defendants further say that the said judgment in the said courts for costs as above stated have never been paid by the plaintiff; that said judgments for costs remain in full force and effect against the said plaintiff and in favor of these defendants.

The defendants therefore allege that the cause of action in this cause or pretended cause of action as set forth in the plaintiff's amended petition herein, has been fully adjudicated and by reason of such adjudication and the non-payment of the said judgments so entered, by the plaintiff, the defendants allege that this last cause of action is simply vexatious and abuse of the process of this court, and that the plaintiff is barred and estopped by reason of said judgment and the non-payment of the same, from maintaining this cause of action.

Third Defense. As a further defense to the plaintiff's pretended cause of action as set forth in his petition as now amended, these defendants say each for himself, that said cause of action now pending was commenced in the District Court of Seward County, Nebraska, on or about the 25th day of February 1895, by said Thomas Bailey, plaintiff, making Charles W. Mosher, Homan J. Walsh, Charles E. Yates, Ellis P. Hamer, Ambrose P. S. Stuart, Richard C. Outedt and Rollo O. Phillips defendants. That on or about the 9th day of July 1895 the said plaintiff took judgment in this action against the defendant Ambrose P. S. Stuart for the full amount of his claim as made against all of the defendants; the plaintiff's cause of action being a joint and several claim against each and all of the defendants.

That said judgment so rendered in the District Court of Seward County in favor of the plaintiff Bailey and against the said defendant

27 Stuart, has not been reversed or set aside but in due course of time executions were issued on said judgment for the collection of the same, and levies were duly made upon the property belonging to the said defendant Stuart, and said property was

sold in satisfaction of the said Judgment rendered in favor of the plaintiff Thomas Bailey. And these defendants allege the fact to be that the plaintiff's claim against these defendants so ripened into judgment has been fully paid and satisfied and the judgment should be discharged of record if it has not already been so discharged, and that said judgment so taken by the said Bailey against the said defendant Stuart and the payment thereof is a complete bar against any further judgment or claim in favor of the said plaintiff against these defendants.

Fourth Defense. These defendants for a further and separate defense to the plaintiff's cause of action, say that as hereinbefore alleged in the first defense in this answer, these defendants in all of their actions concerning and in connection with the said bank acted in their capacity as directors of said national bank and if they neglected any duty as such directors or committed any of the wrongs complained of in the plaintiff's amended petition whereby the said bank became insolvent and gave rise to a cause of action against these defendants sounding in damages, said cause of action existed, if any, in favor of the said bank or the receiver of said bank after his appointment and not in favor of this plaintiff.

These defendants allege the fact to be that if the plaintiff deposited his money in the said bank as alleged, and the bank then failed and became insolvent, the plaintiff could not individually recover the said money from the said bank, and that the said money as well as any damage caused by the alleged neglect of duty on the part of

28 these defendants, did not give rise to any cause of action in favor of this plaintiff; but allege the fact to be that if such

damages resulted from the conduct or neglect of duty on the part of these defendants, a judgment therefor under the law could only be recovered by the said bank in its corporate capacity or by the receiver of said bank; and such damages when recovered would under the law be distributed ratably by the said bank or by the receiver of said bank, among the creditors and stockholders of said bank.

These defendants, each for himself, denies all alleged misconduct and mismanagement of said bank on his part, and all of the alleged neglect of duty and the causing of the insolvency of said bank as charged in the said amended petition.

These defendants therefore allege that the plaintiff has no cause of action against these defendants or either of them.

Wherefore, the defendants pray for judgment for costs.

J. W. DEWEESE,

F. M. HALL,

FRANK E. BISHOP,

Att'ys for said Def'ts.

* * * * *

29 & 30 And now comes the plaintiff and for his reply to each of the separate answers of Charles E. Yates, Ellis P. Hamer, Charles W. Mosher, and Richard C. Outcalt, and denies each

and every allegation of new matter contained in their several answers.

THOMAS BAILEY,
By R. S. NORVAL,
GEO. W. LOWLEY,
J. J. THOMAS, AND
L. C. BURR.

* * * * *

31

Stipulation.

The parties to this stipulation in each of the above entitled causes which are now pending in the district court of Seward County, Nebraska, hereby stipulate and agree that all of said causes shall be tried in the District Court at one and the same time, and that the evidence proper and applicable in any one case, or to any of the parties to this stipulation, whether plaintiff or defendant, subject of course to the objections of either of the parties to this stipulation and governed by the rulings of the Court, shall be offered and produced and the cases respectively disposed of by the Court and jury, unless another trial is granted by the Court.

It is further agreed and stipulated that separate verdicts and judgments shall be rendered in each case, and the same evidence in-so-far as it may be pertinent and competent to any one of said cases or to any of the parties thereto, and being parties to this stipulation, shall be considered by the jury in such case in the disposition thereof; such evidence being properly applied to any one or to all of the parties to this stipulation as the facts and the rulings of the court may warrant.

This stipulation is made in view of the fact that evidence may be produced that is competent and proper in one or more of said cases or applicable to one or more of the parties in said cases signing this stipulation, and may not be competent or proper in other of said cases, or applicable to some of the parties in said cases, and it is agreed that the evidence that is competent or proper in any one case and for or against any one of the parties represented in this stipulation in any case may be received, and that then the whole evidence as thus introduced shall be properly applied to each re-

spective case and to each respective party thereto under the
32-36 rulings and directions of the Court, subject to the objections of either party.

It is further agreed that if either party or any party to any of said causes represented in this stipulation shall desire to prosecute error from judgment of the District Court in any or in all of said cases a transcript of the testimony given on the trial of all of said cases shall be used on the proceedings in error in any or all of said causes as the same may be desired, and that it will be necessary to settle but one bill of exceptions and which may be filed and used in any or all of said cases, in order to thus preserve the record and testimony of the trial of each and all of said cases. And that the bill of exceptions settled in one case shall be the bill of exceptions in each and all of said cases.

In witness whereof the parties hereto have hereunto set their hands this May 10th, 1902.

R. S. NORVAL,

J. J. THOMAS,

Attorneys for Plaintiffs.

H. R. ROSE AND

J. W. DEWEESE,

Attorneys for D. E. Thompson.

J. W. DEWEESE,

Att'y for Defts Yates, Walsh Estate, & Hamer Estate.

CHAS. O. WHEEDON,

Attorneys for Chas. W. Mosher and Rollo O. Phillips.

* * * * *

37 In the District Court of Seward County, Nebraska.

Requests of Defendants for Special Findings.

The Defendants, Charles E. Yates and Louisa P. Hamer as administratrix of the Estate of Ellis P. Hamer, deceased, each separately and for each one alone, requests the court to make and find the following special findings of fact and of law:

I.

That upon the facts stated in the petition and the testimony produced at the trial the plaintiff is not entitled to recover damages against the defendant Yates and that judgment be entered in his favor.

II.

That upon the facts stated in the petition and the testimony produced at the trial the plaintiff is not entitled to recover damages against the defendant Louisa P. Hamer as administratrix of the estate of Ellis P. Hamer, deceased, and that judgment be entered in his favor.

III.

That neither defendant Charles E. Yates nor Ellis P. Hamer, the deceased knowingly violated or knowingly permitted any of the officers, agents or servants of the Capital National Bank to violate any of the provisions of the national banking act under which said Bank operated.

38

IV.

That neither the defendant Charles E. Yates nor the deceased, Ellis P. Hamer, knowingly participated in or assented to any violation of any of the provisions of said national banking act by any of the officers, agents or servants of said Capital National Bank:

V.

That the defendants Charles E. Yates and the deceased, Ellis P. Hamer, neither one, made any oral statement or representation of the financial standing, worth or responsibility of said Bank or of any of its assets or liabilities to the plaintiff or to any officer or representative of the plaintiff, prior to its failure.

VI.

That the plaintiff was not induced or influenced by any parol or oral statement or representation of the defendant Yates or of the deceased Hamer either to deposit any money or property in or to permit the same to remain in said Capital National Bank prior to its failure.

VII.

That the deceased, Ellis P. Hamer, did not make or participate in making and did not sign or attest the report of the condition of the Capital National Bank to the Comptroller of the Currency of date December 28, 1886, and of date December 9, 1892, exhibits "A" and "B" attached to the petition, and his administrator would not be liable for any representations contained in either of said reports, which are the only ones sued upon and sufficiently alleged in the petition as a basis of recovery.

VIII.

That the defendant Charles E. Yates did not make or participate in making either of the reports of the condition of said bank to the Comptroller of the Currency, dated December 28, 1886, and December 9, 1892, nor any of the statements therein contained.

39

IX.

That the defendant Charles E. Yates, in attesting said reports of date December 28, 1886, and December 9, 1892, did not, with actual knowledge thereof or intentionally, make an untrue statement or representation of the assets or liabilities of said Capital National Bank, nor of any of the items of either its assets or liabilities;

X.

That neither the defendant Charles E. Yates nor the deceased, Ellis P. Hamer, with actual knowledge or intentionally, made any untrue statement or representation of any or all of the assets of the Capital National Bank in any or all of the statements or reports made to the Comptroller of the Currency and published by said Bank as required by the National banking act, which reports are shown in the testimony in this case;

XI.

(A) That neither the defendant Charles E. Yates nor the deceased, Ellis P. Hamer, with actual personal knowledge or intentionally made, published or declared, or permitted to be made, published, or declared, any untrue statement, report, or representation of any or all of the assets or liabilities of the Capital National Bank referred to in the petition or shown in the testimony, (B) and that in attesting any of the reports of said Bank which were published by said association, each of said defendants acted in good faith, honestly believing that said statements, reports and publications were true and without any knowledge or intention that any of said statements, reports and representations were untrue.

FRANK E. BISHOP,

For Defendants Yates and Hamer, as Adm'rs.

40 Afterwards, on the 1st day of April A. D. 1911, there was filed herein a certain Request of Defendants Yates and Hamer for Additional Findings, in words and figures following to-wit:

In the District Court of Seward County, Nebraska.

* * * * *

Request of Defendants Yates and Hamer for Additional Special Findings.

The defendant Charles E. Yates requests the Court to find as follows:

12. That he did not personally take any part in the preparation or distribution of the printed slips or business cards showing the assets and liabilities of the bank, as had been shown in the official reports to the comptroller and printed in the newspaper- and the names of the directors of the bank.

13. That he did not know that said printed slips or business cards were prepared or distributed to the plaintiff.

The defendant Louisa P. Hamer, as administratrix, requests the court to find as follows:

15. That the evidence does not show that Ellis P. Hamer personally knew of the preparation or distribution of the printed slips or business cards showing the assets and liabilities of the bank, as had been shown in the official reports to the comptroller and printed in the newspapers and the names of the directors of the bank.

41 & 42 16. That the evidence does not show said Hamer personally took part in the preparation *nor* distribution of said printed slips or business cards.

17. That the evidence does not show said E. P. Hamer knew that advertisements of the Bank, showing its assets, liabilities, and officers' names, were printed and carried in the newspapers.

FRANK E. BISHOP,

Attorney for Defendants Yates and Hamer.

* * * * *

43-45 And now on this 30th day of January, 1911, being a day of the November 1910 term of this court, the above entitled causes came on for trial and by agreement of all parties in open Court each and all of the above entitled causes are consolidated for the purposes of this trial. And Jury having been waived thereupon the trial proceeds to the Court from day to day, upon the pleadings and the evidence until February 3rd, 1911, at which time the trial of said causes is adjourned until February 6th, 1911, at 1:30 P. M.

* * * * *

46 THE BANK OF STAPLEHURST, Plaintiff,
vs.
CHARLES E. YATES et al., Defendants.

And now on this 1st day of April, 1911, being a day of the February 1911 term of this Court, these causes came on further to be heard on the motion of each of the plaintiffs for leave to amend their interlined amended *by* petitions by interlineation upon consideration whereof said motions and each of them are sustained and the plaintiffs and each of them permitted to amend their petitions as prayed; to which ruling of the Court the defendants and each of them except.

In the District Court of Seward County, Nebraska.

THOMAS BAILEY, Plaintiff,
vs.

CHARLES E. YATES, LOUISA P. HAMER, as Administratrix of the Estate of Ellis P. Hamer, Deceased, et al., Defendants.

Special Findings of Fact and Conclusions of Law.

And now on this first day of April, 1911, the Court in pursuance of the requests of Charles E. Yates, and Louisa P. Hamer, administratrix, defendants in this cause, makes the following findings of fact and conclusions of law:

Respecting the first request the Court finds the conclusions of law in favor of the plaintiff and against the defendant Yates.

47 Respecting the second request the Court finds the conclusions of law in favor of the plaintiff and against the defendant Hamer.

Respecting the third request the Court finds against each of the defendants and in favor of the plaintiff.

Respecting the fourth request the court finds against each of the defendants and in favor of the plaintiff.

Respecting the fifth and sixth requests the Court finds the facts in favor of the defendants as to each request.

Respecting the seventh request the Court finds that the deceased Hamer did not attest the reports of December 28, 1886 and December 9, 1892.

Respecting the eighth request the Court finds as a matter of fact that the defendant Yates did attest the reports of the Capital National Bank made to the Comptroller of date December 28, 1886 and December 9, 1892.

Respecting the ninth request, as to the report of December 28, 1886, the Court answers the same in the negative, and as to the report of December 9, 1892 the Court answers the question in the affirmative.

Respecting the tenth request the Court finds in the affirmative.

Respecting the eleventh request the Court finds that the same contains two interrogatories, sub-division "A" ending with the word "testimony" in the sixth line, and the residue thereof contained in sub-division "B" and answers the first question contained in subdivision "A" in the affirmative, and the second question contained in sub-division "B" in the negative.

48-58 Subject to the foregoing Special Findings of Fact made at the request of the defendants, the Court finds generally in plaintiff's favor and against the defendants and each of them upon the evidence under the issues joined, and that the allegations of plaintiff's amended petition are true, and that plaintiff is entitled to recover in an action of deceit under the principles of the common law exclusively of the requirements of the national banking act. The Court further finds that the plaintiff has sustained damages in the sum of \$14085.37.

To each of the findings of fact and conclusions of law made by the Court the defendants each severally except.

B. F. GOOD, *Judge*.

* * * * *

59 In the District Court of Seward County, Nebraska.

THOMAS BAILEY, Plaintiff,

vs.

CHARLES W. MOSHER, HOMAN J. WALSH, CHARLES E. YATES, ELLIS P. HOMER, Ambrose P. S. Stuart, Richard C. Outcalt, and Rollo O. Phillips, Defendants.

Motion to Amend Petition.

Comes now the plaintiff and moves the Court to amend its last petition filed herein in this to-wit: that it be permitted to amend its petition as follows, to-wit:

On page 2, line 31, after the words "to be" add the words "printed and".

On page 2, line 48, after the word "plaintiff" add the words "and sent by defendants and their agents to plaintiff through the United States Mails and otherwise".

On page 2, line 53, after the word "advertisements" add the words "and the statements sent by defendants to plaintiff as aforesaid".

On page 2, line 55, after the word "advertisements" add the words

"and the statements made by the defendants to the plaintiff as aforesaid."

On page 3, line 66, after the word "public" add the words "and sent and delivered to plaintiff statements of its condition".

On Page 3, line 68, after the word "published" add the words "and sent and given to plaintiff".

On page 3, line 83, after the word "newspaper" add the words "and as aforesaid caused and permitted to be made and sent and delivered to plaintiff statements of the bank's condition."

60 On page 3, line 86, after the word "statements" add the words "and upon the statements of its financial condition sent to and received by plaintiff as aforesaid".

On page 4, line 110, after the word "Nebraska" add the words "and said defendants on or about said date sent and caused to be sent to and received by plaintiff said false and untrue statements aforesaid".

On page 4, line 120, after the word "Nebraska" add the words "and sent and caused to be sent to and received by plaintiff said false and untrue statements aforesaid."

On page 5, line 132, after the word "Nebraska" add the words "and sent and caused to be sent to and received by the plaintiff said false and untrue statements aforesaid through the United States Mails and otherwise, and which were received by plaintiff".

On page 5, line 139, after the word "published" where it appears the second time add the words "and sent and delivered to plaintiff".

On page 5, line 143, after the word "published" add the words "and as sent and delivered to and received by plaintiff".

On page 5, line 153, after the word "advertisements" add the words "and said statements of its financial condition so sent and received by the plaintiff".

On page 5, line 157, after the word "advertisements" add the words "and other statements as aforesaid".

On page 5, line 158, before the word "this" insert the following words "and statements sent to plaintiff by defendants and by plaintiff received and examined".

On page 6, line 174, after the word "statements" insert the following words "so sent and received by plaintiff as aforesaid" and after the word, "advertisements" add the words "and statements".

61 On page 6, line 181, after the word "made" the second time add the words "and said statements so sent to and received by plaintiff".

On page 5, line 184, after the word "statements" add the words "so sent to and received by plaintiff".

On page 6, line 181, after the word "advertisements" add the words "and sent to and caused to be received by plaintiff said false and untrue statements".

On page 6, line 198, after the word "advertisements" add the words "by said statements so sent to and received by plaintiff".

On page 6, line 204, after the word "advertisements" add the words "and said statements so sent to and received by plaintiff".

On page 7, line 217, after the word "advertisements" add the words "and sending to and causing to be received by plaintiff said statements".

On page 7, line 220, after the word "said" strike out and omit the word "published".

THOMAS BAILEY,
Plaintiff,

By NORVAL BROS. &
J. J. THOMAS,
His Attorneys.

* * * * *

62 The defendant Charles E. Yates moves the Court to set aside his findings, and grant a new trial for these reasons:

1. The last amended petition does not state facts sufficient for a cause of action against this defendant nor any right to recover against this defendant.

2. The findings and judgment against this defendant are contrary to law and are not supported by evidence sufficient to sustain them.

3. For errors of law occurring at the trial to which the defendant excepted.

4. The court erred in finding the defendant liable on either of the reports of December 28, 1886, and of December 9, 1892, and the evidence is insufficient to sustain a judgment against the defendant on either of said reports.

5. The court erred in admitting in evidence and in finding liability on the reports other than those of December 28, 1886, and December 9, 1892, which former reports were not sufficiently pleaded and the evidence on them is not sufficient to sustain the findings and judgment against the defendant.

6. The court erred in his finding against the defendant on the first request, which is not supported by the evidence, and the defendant excepts to said *finding*.

7. The court erred in his finding against the defendant on the second request, which is not supported by the evidence, and this defendant excepts to said finding.

8. The court erred in his finding against the defendant on the third request which is not supported by the evidence, and the defendant excepted to said *finding*.

9. The court erred in finding on the third request that Charles E. Yates knowingly violated or knowingly permitted the officers, agents or servants of the bank to violate any of the provisions of the banking act and that the defendant is liable at the common law for deceit therefor.

10. The court erred in his finding against the defendant on the fourth request which is not supported by the evidence and the defendant excepts to said finding.

11. The court erred in finding on the fourth request that Charles E. Yates knowingly participated in or assented to the violation of any provision of the banking act by any of the officers, agents or

servants of the bank, and that the defendant is liable at the common law for deceit therefor.

12. The court erred in refusing to find on the seventh request that Ellis P. Hamer did not make or participate in making the reports of December 28, 1886, and December 9, 1892, to which the defendants excepts.

13. The court erred in refusing to find on the eighth request that Charles E. Yates did not make or participate in making the reports of December 28, 1886, and December 9, 1892, to which the defendant excepts.

14. The court erred in his finding on sub-division B of the eleventh request that Charles E. Yates, in attesting the reports did not act in good faith, honestly believing said reports and statements were true, and knew and intended the same to be untrue, to which the defendant excepts.

15. The court erred in his finding on sub-division B of the eleventh request that Charles E. Yates attested any of the official reports of the bank in bad faith without honest belief that said reports were true and knowing and intending that the same were untrue, which finding is not supported by any evidence and is contrary to the law and the evidence.

64 16. The court erred in his finding on sub-division B of the eleventh request that the defendant is liable at common law for deceit when if said finding were true the liability must be determined by the provisions of the National Banking Act and Section 5239 thereof, and the evidence does not sustain such a finding nor liability under said act.

17. The court erred in finding the allegations and issues of the amended petition in favor of the plaintiff, and the same are not supported by sufficient evidence to sustain recovery against the defendant thereon.

18. The court erred in finding that the plaintiff is entitled to recover in an action of deceit under the common law exclusive of the requirements of the National Banking Act, said finding is not supported by sufficient allegations of fact nor by the evidence, and the conduct of the defendant shown by the evidence is entirely controlled by the provisions of said act and no liability is established thereunder.

19. All the acts and conduct of Charles E. Yates shown in the evidence are within, governed and authorized by the provisions of the National Banking Act and under and according to the terms and provisions of said act the defendant is not liable to the plaintiff in this action and the finding and judgment should be for the defendant thereon.

20. The court erred in finding that Charles E. Yates knew of or participated in the preparation or distribution or use of the printed slips or business cards of the bank or of the advertisements in the newspapers and in *such* of the findings Nos. 12, 13, and 14 and that defendant is liable therefor at common law for deceit. There is no evidence to support such finding and the preparation, distribution

65 and use of said printed matter were all within and authorized by the National Banking Act and if any liability exists for the same against the defendant it is governed and limited by the provisions of said act and Section 5239 thereof and not at common law on an entirely different rule of law and measure of liability.

21. The court erred in holding the defendant liable for the preparation, distribution and publication of the printed slips and business cards of the bank, showing its assets, liabilities and officers' names and the newspaper advertisements, none of which was done by, participated in or known of by this defendant or Ellis P. Hamer nor for which they were responsible nor liable at the common law or otherwise under the National Banking Act, and in making each finding Nos. 12, 13, and 14.

21a. The court erred in finding against this defendant on point "A" of the eleventh request.

21b. The Court erred in finding against defendant on the 9th request as to report Dec. 9, 1892.

21c. The Court erred in finding against defendant on the tenth request.

22. The finding and judgment is not sustained by the special findings.

23. On the special findings by the Court, the plaintiff is not entitled to recover against the defendant on the cause of action in the petition and the defendant is not liable thereon and judgment should be entered in his favor.

24. The conclusion and judgment that the plaintiff in an individual capacity is entitled to recover for negligence or deceit on the principle of the common law for the defendant's negligent performance of his duty as a director of the Bank and for misfeasance and mismanagement in his official duties; are contrary to and violative of the provisions of the National Banking law and the plan of liquidation and distribution of assets of insolvent National Banks in that all liabilities of Directors by said act for official neglect, misfeasance and mismanagement pass to the Receiver of such Bank to be enforced by him for ratable distribution and benefit of all creditors while the judgment and findings permit the plaintiff to recover personally to the exclusion of all other creditors which violates and nullifies the provisions of said act.

25. The Court erred in finding and adjudging the defendant liable on the cause of action in the petition and that the same is not governed and limited by the liabilities imposed upon Directors of National Banks by the National Banking act, being title 62 revised Statutes of United States and in adjudging that a common law action of deceit can be maintained against him for neglect of official duty under said act, or upon the manner in which he conducted or failed to conduct the business of the Bank upon grounds other than the liabilities imposed by said act.

26. The Court erred in finding and adjudging the defendant notwithstanding the defendant was without knowledge of the falsity of any report attested by him with honest belief on information

from the managing officers of the Bank that they were true upon the principles of the common law exclusive of said act and in violation of the provision of Section 5239 revised statute which makes liability depend upon the fact that directors knowingly violated or knowingly permitted the violation of the provisions of said act and knowingly and willfully participated in and assented to such violation.

27. The findings and judgment are contrary to and violative of the decision of the Supreme Court of the United States upon a writ of error to the Supreme Court of Nebraska in proceedings by appeal from this Court in this identical case reported in volume 206 U. S.

Supreme Court Reports Pages 158 to 181 inclusive and also 67 of the judgment of said United States Supreme Court on said writ of error and the mandate of said Court on said judgment pursuant to which these further proceedings are had in the following particulars:

(a) the findings and judgment violate the holding of said Supreme Court that section 5239 revised statutes of the United States furnished the exclusive test of liability in actions against Bank Directors for deceit based upon false official reports of the resources and liabilities of a National Bank. (b) They are violative of the holding of said Court that a Director of a National Bank is not charged with knowledge that a report attested by him is true or false as matter of law by reason of his official relation or upon the theory that "it was his duty to know or refrain from acting (c) They are violative of the holding of said Court that liability of a Director of such Bank for deceit does not attach from the fact that a Director "merely, negligently participated in or assented to the making and publishing of an untrue official report". (d) They are violative of the holding of said Court "that where by law responsibility is made to arise from the violation of a statute knowingly, something more than negligence is required, that is, that the violation must in effect be intentional." And in each and every of these respects the Court has denied that due faith and credit to the judgment of the Supreme Court of the United States required to be given it by the Constitution of the United States and the acts of Congress passed pursuant thereto and by the inherent necessity of according such faith and credit to all decisions of said Court in order to maintain the constitutional requirement that "this constitution and the laws of the United States which shall be made in pursuance thereto shall be the supreme law of the land and the judges in every state shall be bound thereby any thing in the constitution of laws of any state to the contrary notwithstanding", contained in section 2 article 6 of the constitution of the United States.

28. Upon the issues and the evidence, the defendant is entitled to judgment in his favor and moves the Court to render such judgment thereon.

29. Upon the facts specially found, this defendant is entitled to judgment in his favor as matter of law and moves the Court to render such judgment thereon notwithstanding his general finding for the plaintiff.

30. The damages are excessive and not supported by the evidence.

31. The Court erred in allowing interest in this action for tort upon the principle amount.

32. The finding and judgment are against the clear weight of the evidence.

33. The court erred in finding on the ninth request in the affirmative as to the report of December 9, 1892.

34. The court erred in finding on the tenth request in the affirmative or that the defendant with actual knowledge or intentionally made any untrue statement of the financial condition of the bank in the reports made to the comptroller.

35. The Court erred in its first finding on its own motion that the bank never had any capital or surplus.

36. The court erred in its second finding on its own motion that either Ellis P. Hamer or defendant Yates had knowledge that advertisements, statements and representations, either official or unofficial were prepared and sent to the plaintiff or distributed either by their authority or otherwise.

37. The Court erred in its third finding on its own motion that either Ellis P. Hamer or the defendant Yates knew that statements or representations, either official or voluntary, were prepared, distributed or sent to the plaintiff which contained material false representations of the financial condition of the bank, or were in fact false and untrue, and the court erred in finding that either of them knowingly permitted, assented to or allowed such official or voluntary statements to be made, published advertised or sent to the plaintiff, and the court erred in finding that any of said official statements or advertisements were untrue, either with the knowledge or permission of this defendant.

38. The court erred in its fourth finding on all the issues joined for the plaintiff and against the defendant and that the allegations of the amended petition were true.

39. This defendant excepts to each one severally of the findings of the court on the first requests made by this defendant on the requests made by the defendant Thompson on the additional requests made by this defendant and on the findings by the court on its own motion.

The defendant hereby gives notice of appeal of this judgment to the Supreme Court of this State.

FRANK E. BISHOP,

For Defendants.

* * * * *

70 In District Court, Seward County, Nebraska.

* * * * *

Motion for New Trial.

The defendant Louisa P. Hamer, Admx., moves the court to set aside her findings and grant a new trial for these reasons:

1. The last amended petition does not state facts sufficient for a

cause of action against this defendant nor any right to recover against this defendant.

2. The findings and judgment against this defendant are contrary to law and are not supported by evidence sufficient to sustain them.

3. For errors of law occurring at the trial to which the defendant excepted.

4. The court erred in finding the defendant liable on either of the reports of December 28, 1886 and of December 9, 1892, and the evidence is insufficient to sustain a judgment against the defendant on either of said reports.

5. The court erred in admitting in evidence and in finding liability on the reports other than those of December 28, 1886 and December 9, 1892, which former reports were not sufficiently pleaded and the evidence on them is not sufficient to sustain the findings and judgment against the defendant.

6. The court erred in his finding against the defendant on the first request, which is not supported by the evidence, and the defendant excepts to said finding.

7. The court erred in his finding against the defendant on the second request, which is not supported by the evidence and
71 this defendant excepts to said finding.

8. The court erred in his finding against the defendant on the third request which is not supported by the evidence and the defendant excepts to said finding.

9. The court erred in finding on the third request that Ellis P. Hamer knowingly violated or knowingly permitted the officers, agents or servants of the bank to violate any of the provisions of the banking act and that the defendant is liable at the common law for deceit therefor.

10. The court erred in his finding against the defendant on the fourth request, which is not supported by the evidence and the defendant excepts to said finding.

11. The court erred in finding on the fourth request that Ellis P. Hamer knowingly participated in or assented to the violation of any provision of the banking act by any of the officers, agents or servants of the Bank and that the defendant is liable at the common law for deceit therefor.

12. The court erred in refusing to find on the seventh request that Ellis P. Hamer did not make or participate in making the reports of December 28, 1886 and December 9, 1892, to which the defendant excepts.

13. The court erred in refusing to find on the eighth request that Charles E. Yates did not make or participate in making the reports of December 28, 1886, and December 9, 1892, to which defendant excepts.

14. The court erred in his finding on sub-division B of the eleventh request that Ellis P. Hamer, in attesting the reports, did not act in good faith, honestly believing said reports and statements were true, and knew and intended the same to be untrue, to which the defendant excepts.

72 15. The court erred in his finding on sub-division B of the eleventh request that Ellis P. Hamer attested any of the official reports of the bank in bad faith without honest belief that said reports were true and knowing and intending that the same were untrue, which finding is not supported by any evidence and is contrary to the law and the evidence.

16. The court erred in his finding on sub-division B of the eleventh request that the defendant is liable at common law for deceit when if said finding were true the liability must be determined by the provisions of the National Banking Act and Section 5239 thereof, and the evidence does not sustain such a finding nor liability under said act.

17. The court erred in finding the allegations and issues of the amended petition in favor of the plaintiff and the same are not supported by sufficient evidence to sustain recovery against the defendant thereon.

18. The court erred in finding that the plaintiff is entitled to recover in an action of deceit under the common law exclusive of the requirements of the National Banking Act, said finding is not supported by sufficient allegations of fact nor by the evidence, and the conduct of the defendant shown by the evidence is entirely controlled by the provisions of said act and no liability is established thereunder.

19. All the acts and conduct of Ellis P. Hamer shown in the evidence are within, governed and authorized by the provisions of the National Banking Act and under and according to the terms and provisions of said act the defendant is not liable to the plaintiff in this action and the finding and judgment should be for the defendant thereon.

73 20. The court erred in finding that Ellis P. Hamer knew of or participated in the preparation or distribution or use of the printed slips or business cards of the bank or of the advertisements in the newspapers and each of the findings Nos. 15, 16, and 17 and that defendant is liable therefor at common law for deceit. There is no evidence to support such finding and the preparation, distribution and use of said printed matter were all within and authorized by the National Banking Act and if any liability exists for the same against the defendant it is governed and limited by the provisions of said act and Section 5239 thereof and not at common law on an entirely different rule of law and measure of liability.

21. The court erred in holding the defendant liable for the preparation, distribution and publication of the printed slips and business cards of the bank, showing its assets, liabilities and officers' names and the newspaper advertisements, none of which was done by, participated in or known of by the defendant or Ellis P. Hamer nor for which they were responsible nor liable at the common law or otherwise under the National Banking Act, and in making each finding Nos. 15, 16, and 17.

21a. The court erred in finding against this defendant on point "A" of the eleventh request.

216. The court erred in finding against defendant on the tenth request.

22. The finding and judgment is not sustained by the special findings.

23. On the special findings by the Court, the plaintiff is not entitled to recover against the defendant on the cause of action in the petition and the defendant is not liable thereon and judgment

74 should be entered in his favor.

24. The conclusion and judgment that the plaintiff in an individual capacity is entitled to recover for negligence or deceit on the principle of the common law for the defendant's negligent performance of his duty as a director of the Bank and for misfeasance and mismanagement in his official duties, are contrary to and violative of the provisions of the National Banking law and the plan of liquidation and distribution of assets of insolvent National banks in that all liabilities of Directors by said act for official neglect misfeasance and mismanagement pass to the Receiver of such Bank to be enforced by him for ratable distribution and benefit of all creditors while the judgment and findings permit the plaintiff to recover personally to the exclusion of all other creditors which violates and nullifies the provisions of said act.

25. The Court erred in finding and adjudging the defendant liable on the cause of action in the petition and that the same is not governed and limited by the liabilities imposed upon Directors of National Banks by the National Banking act, being title 62 revised Statutes of United States and in adjudging that a common law action of deceit can be maintained against him for neglect of official duty under said act, or upon the manner in which he conducted or failed to conduct the business of the Bank upon grounds other than the liabilities imposed by said act.

26. The Court erred in finding and adjudging the defendant liable notwithstanding the defendant was without knowledge of the falsity of any report attested by him and with honest belief on information from the managing officers of the Bank that they were true upon the principles of the common law exclusive of said act and in violation of the provision of section 5239 revised statute which makes liability depend upon the fact that directors knowingly
75 violated or knowingly permitted the violation of the provisions of said act and knowingly and willfully participated in and assented to such violation.

27. The findings and judgment are contrary to and violative of the decision of the Supreme Court of the United States upon a writ of error to the Supreme Court of Nebraska in proceedings by appeal from this Court in this identical case reported in volume 206 U. S. Supreme Court Reports Pages 158 to 181 inclusive and also of the judgment of said United States Supreme Court on said writ of error and the mandate of said Court on said judgment pursuant to which these further proceedings are had in the following particulars: (a) the findings and judgment violate the holding of said Supreme Court that section 5239 revised statutes of the United States furnished the exclusive test of liability in actions against Bank Direc-

tors for deceit based upon false official reports of the resources and liabilities of a National Bank. (b) They are violative of the holding of said Court that a Director of a National Bank is not charged with knowledge that a report attested by him is true or false as matter of law by reason of his official relation or upon the theory that "it was his duty to know or refrain from acting" (c) They are violative of the holding of said Court that liability of a Director of such Bank for deceit does not attach from the fact that a Director "merely, negligently participated in or assented to the making and publishing of an untrue official report". (d) They are violative of the holding of said Court" that where by law responsibility is made to arise from the violation of a statute knowingly, something more than negligence is required, that is, that the violation must in effect be intentional". And in each and every of these respects the Court

76 has denied that due faith and credit to the judgment of the Supreme Court of the United States required to be given it by the Constitution of the United States and the acts of Congress passed pursuant thereto and by the inherent necessity of according such faith and credit to all decisions of said Court in order to maintain the constitutional requirement that "this constitution and the laws of the United States which shall be made in pursuance thereto shall be the supreme law of the land and the judges in every state shall be bound thereby anything in the Constitution or laws of any state to the contrary notwithstanding", contained in section 2 article 6 of the constitution of the United States.

28. Upon the issues and the evidence, the defendant is entitled to judgment in his favor and moves the Court to render such judgment thereon.

29. Upon the facts specially found, this defendant is entitled to judgment in his favor as matter of law and moves the Court to render such judgment thereon notwithstanding his general finding for the plaintiff.

30. The damages are excessive and not supported by the evidence.

31. The Court erred in allowing interest in this action for tort upon the principal amount.

32. The finding and judgment are against the clear weight of the evidence.

33. The court erred in finding on the ninth request in the affirmative as to the report of December 9, 1892.

34. The court erred in finding on the tenth request in the affirmative or that the defendant with actual knowledge or intentionally made any untrue statements of the financial condition of the
77 bank in the reports made to the comptroller.

35. The court erred in its first finding on its own motion that the bank never had any capital or surplus.

36. The court erred in its second finding on its own motion that either Ellis P. Hamer or defendant Yates had knowledge that advertisements, statements and representations, either official or unofficial, were prepared and sent to the plaintiff or distributed either by their authority or otherwise.

37. The court erred in its third finding on its own motion that

either Ellis P. Hamer or the defendant Yates knew that statements or representations, either official or voluntary, were prepared, distributed or sent to the plaintiffs which contained material false representations of the financial condition of the bank, or were in fact false and untrue, and the court erred in finding that either of them knowingly permitted, assented to or allowed such official or voluntary statements to be made, published, advertised or sent to the plaintiff, and the court erred in finding that any of said official statements or advertisements were untrue, either with — the knowledge or permission of this defendant.

38. The court erred in its fourth finding on all the issues joined for the plaintiff, and against the defendant and that the allegations of the amended petition were true.

39. This defendant excepts to each one severally of the findings of the court on the first requests made by this defendant on the requests made by defendant Thompson on the additional requests made by this defendant and on the findings by the court on its own motion.

The defendant hereby gives notice of appeal of this judgment to the Supreme Court of this State.

FRANK E. BISHOP,
For Defendants.

78 Afterwards, on the 8th day of May, 1911, there was had and entered of record herein certain findings and the judgment of the Court, in words and figures following, to-wit:

In the District Court of Seward County, Nebraska.

THOMAS BAILEY, Plaintiff,

vs.

CHARLES E. YATES et al., Defendants.

And now on this 8th day of May, 1911, it being the first day of the May 1911 term, of this Court, this cause came on to be heard on the request of the defendants, for additional special findings filed herein, April 1st, 1911, and for final determination and the Court being fully advised in the premises in response to the request of the defendants, Charles E. Yates and Louisa P. Hamer, makes the following additional special findings of fact and conclusions of law:

Respecting the 12th request for additional finding the Court finds that the defendant, Charles E. Yates, did not personally take part in the preparation or distribution of the printed slips or business cards showing the assets and liabilities of the bank, as shown in the evidence, but the Court finds that the defendant Yates, knew that such printed slips and business cards were compiled, prepared and distributed by the bank, from time to time and contained his name as one of the directors thereof, and purported and assumed to be compiled, prepared and distributed under the authority and direc-

tions of said defendant Yates, and in his name as one of the directors of the bank.

79 Respecting the request numbered 13, the Court finds that the defendant Charles E. Yates, did not know that such printed slips and business cards in the name of the Directors including the said Charles E. Yates, were prepared and distributed to the customers, patrons and depositors of the Capital National Bank.

Respecting the 14th request, the Court finds against the defendant Yates.

Respecting the 15th request the Court finds that the said Ellis P. Hamer, did know, that said printed slips and business cards, in the name of the Directors including the said Ellis P. Hamer, were prepared, and distributed to the customers, patrons and depositors of the Capital National Bank.

Respecting the 16th request the Court finds that the said Ellis P. Hamer, did not personally take part in the preparation or distribution of the printed slips or business cards, showing the assets and liabilities of the bank, as shown in the evidence but the Court finds that he did know that such printed slips and business cards were prepared and distributed by the bank, from time to time and contained his name as one of the directors thereof, and purported and assumed to be prepared and distributed under the authority and directions of said Ellis P. Hamer, and in his name as one of the directors of the bank.

Respecting the 17th request the Court finds against the said Hamer.

The Court further and upon its own motion finds as to each and all the defendants, in this action that,—The Capital National Bank, at the time it assumed that name and at the time it increased its capital stock to \$300,000 had sustained losses greatly in excess of its purported capital stock, and that it never, in fact, had any capital stock, undivided profits, or surplus and that it was at all times insolvent and so continued up to the time it ceased to do business, on January 21, 1893, at which time, its liabilities exceeded its assets by more than a million dollars.

80 The Court finds that from and after September 1891, the said Ellis P. Hamer, and the defendants Yates and Thompson, and each of them had knowledge and knew that the statements, advertisements, and representations of the bank's financial condition and capital stock, both official and unofficial and voluntary shown by the evidence were being published in the newspapers and sent to the Plaintiff, by the officers of the Bank, as alleged in the amended petition and that they contained the names of all the directors including said Ellis P. Hamer, and the defendants Yates and Thompson, and purported to be made and published under and by their authority in their names and with their sanction and consent.

The Court further finds that the said Ellis P. Hamer, and the defendants, Yates and Thompson, and each of them, from and after September 1891, had knowledge and knew said statements, representations and advertisements aforesaid, contained material false representations of the financial condition of said bank, and were in

fact false and untrue, as in Plaintiff's amended petition alleged and with knowledge of all of the matters and facts aforesaid they and each of them, knowingly permitted, assented to and allowed the same to be made, published, advertised, and sent to plaintiff, as aforesaid as in the amended petition alleged. The said statements and advertisements aforesaid showed and represented the Bank to be in a sound solvent and prosperous financial condition, when in fact it was at all times wholly insolvent and unable to pay its liabilities.

The Court further finds on all the issues joined for the plaintiff and against the defendants and each of them and that the 81-95 allegations of plaintiff's amended petition are true.

To all of which findings the defendants and each of them severally except.

It is therefore ordered and adjudged by the Court that the plaintiff have and recover from the defendants and each of them the sum of \$14,085.37 Dollars, with seven (7) per cent interest thereon from April 1st, 1911, and costs of action taxed at — Dollars.

And thereupon and on the same day, this cause came on further to be heard on the motions of the defendants for new trial and the Court being fully advised in the premises doth overrule the same to which the defendants and each of them except and are allowed Forty (40) days from the rising of the Court within which to prepare "and serve bill of exception."

* * * * *

96 Supreme Court of Nebraska, January Term, A. D. 1913,
Jan. 31.

No. 17279.

THOMAS BAILEY, Appellee,

v.

CHARLES E. YATES et al., Appellants.

Appeal from the District Court of Seward County.

This cause coming on to be heard upon appeal from the district Court of Seward county, was argued by counsel and submitted to the court; upon due consideration whereof, the court doth find error apparent in the record of the proceedings and judgment of said district court; it is, therefore, considered, ordered and adjudged that said judgment of the district court be, and the same hereby is, reversed and action dismissed; that appellants pay all costs incurred herein by them, taxed at \$—, and have and recover from appellee all their costs so expended; that appellee pay all costs incurred herein by him, taxed at \$—, for all of which execution is hereby awarded, and that a mandate issue accordingly.

J. FAWCETT,
Acting Chief Justice.

* * * * *

97

JONES NATIONAL BANK

v.

YATES.

BANK OF STAPLEHURST

v.

YATES.

UTICA BANK

v.

YATES.

BAILEY

v.

YATES.

Nos. 17276-7-8-9.

Opinion. Filed Jan. 31, 1913.

1. The national bank act as provided in section 5239 of the Revised Statutes of the United States affords the exclusive rule by which to measure the right to recover damages from directors based upon a loss resulting solely from their violation of a duty expressly imposed upon them by a provision of the act, and that liability cannot be measured by a higher standard than that which is imposed by the act.

2. Whereby the federal statute concerning national banks a responsibility is made to arise against the directors from its violation knowingly, proof of something more than negligence is required and it must be shown that the violation was intentional.

3. Where the directors of a failed national bank claim immunity under section 5239 of the Revised Statutes of the United States as to the rule of liability to be applied to them, the state courts may not create another rule than that provided by the national bank act, nor are they at liberty to disregard the rule provided by the act.

4. If there is a penalty or liability enforced because of the violation or disregard of the United States statute, then the penalty is that provided by such statute, and the interpretation of the statute made by the United States supreme court must be adopted by the state courts.

5. The civil liability of national bank directors in respect to the making and publishing of the official reports of the condition of the bank is based upon the duty enjoined by the national bank act, and the rule expressed by the statute is the exclusive rule because of the elementary principle that where a statute creates a duty and prescribes a penalty for its non-performance "the rule prescribed in the statute is the exclusive test of liability." *Yates v. Jones Nat. Bank*, 206 U. S. 158; *Farmers & Merchants Nat. Bank v. Dearing*, 91 U. S. 29.

6. To render a director of a national bank personally liable to a depositor for fraud and deceit practiced by its officers, as at common law, it must be alleged and proven that the director had knowledge of or approved of, or participated in, the fraudulent acts of which complaint is made.

99 HAMER, J.:

The cases designated by the foregoing titles and numbers are before this court a second time. By our former decisions we affirmed the judgments of the district court of Seward county in which the plaintiffs were successful. The cases were taken on error to the supreme court of the United States where our judgments were reversed, *Yates v. Jones Nat. Bank*, 203 U. S. 158; *Yates v. Utica Bank*, *Yates v. Bailey*, and *Yates v. Bank of Staplehurst*, 206 U. S. 181, where it was held that plaintiffs' petitions were insufficient to charge the defendants with a common law liability for fraud and deceit. When the mandates were received by this court the causes were remanded to the district court of Seward county for further proceedings. Thereafter plaintiffs amended their petitions by interlineations, and thereby sought to change their causes of action so as to avoid the federal question. Upon a second trial the plaintiffs again had the judgments and from these judgments the defendants have appealed.

Defendants contend, among other things, that the amendments above mentioned were wholly insufficient to change the plaintiff's causes of action; that they still charge a violation of the national bank act, and that question will be first considered.

An examination of the record discloses that the interlineations by which it was sought to amend the petitions consisted of some slight amplifications of the statements contained in the original petitions as theretofore amended. The amendments contain no material additional statement of facts, and the petitions still charge the defendants with making false statements to the comptroller of the currency as to the condition of the Capital National Bank, and this is the main foundation or basis for recovery. By the amendments plaintiffs attempt to charge that the defendants knowingly and fraudulently and with the intent to deceive the plaintiffs made such statements and that they thereby induced the plaintiffs to become depositors in the Capital National Bank.

To the petitions thus amended each of the defendants demurred. The demurrers were overruled and the defendants excepted. It is probable that the demurrers should have been sustained, but defendants answered over and admitted that the Capital National Bank was organized under the national banking act, but denied that they signed the statements or reports made to the comptroller as stated in the petition; alleged that they had no knowledge of the falsity or untruth of any of them, or of the true condition of the Capital National Bank at the times mentioned in the amended petition; denied that they caused the reports to be published in the

newspapers; denied that they caused them to be sent to the public or to the plaintiffs; denied that they had any knowledge that they were so sent by any of the officers or agents of the bank; they also pleaded a former adjudication and averred that the only acts performed by them were done in compliance with the provisions of the national banking act, and that their liability, if any, was measured by the terms of that act, and not otherwise.

101 Plaintiffs' replies were a general denial of the facts stated in the defendants' answers. Trials were had to the court without the intervention of a jury. There was a general finding for the plaintiffs, together with certain special findings as to each of the defendants, some of which are inconsistent with the general finding, and upon such findings the judgments appealed from were rendered. Defendants have renewed their objections to the sufficiency of the plaintiff's amended petitions, and also contend that the testimony is insufficient to sustain the general finding upon which the judgments in question are predicated.

It is impracticable, considering the length of the petitions and the manner in which they were amended by interlineations, to set them forth in this opinion, and it is sufficient to say that we are of opinion that the amendments in no way changed the nature of the plaintiffs' causes of action; and unless the supreme court of the United States shall recede from its decision of these cases the petitions will be held insufficient by that court to state a common law liability for fraud and deceit as against the defendants who are simply directors of the Capital National Bank.

Coming now to the consideration of the additional evidence introduced upon the second trial of these cases we are of opinion that it is insufficient to charge the defendants with a personal liability for fraud and deceit. The testimony is clear, and practically without dispute, that when defendants Yates and Hamer
102 signed the reports of December 9, 1892, and December 28, 1886, which are the ones upon which this action is, in fact, predicated, neither of them had any personal knowledge of their falsity, but signed them in good faith, believing that they exhibited the true condition of the Capital National Bank. It is not shown that either Yates or Hamer ever had any communication or conversation with the plaintiffs, or any of them, in regard to the condition of the Capital National Bank. It is not shown that they, or either of them, had any knowledge that any published statements or cards containing any information as to the condition of the bank was ever sent to the plaintiffs, or any of them, by any officer or agent of the bank.

It follows therefore that the evidence is insufficient to charge them, or either of them, with ever having knowingly made any false statement in regard to the condition of the bank, or participated in sending any advertising matter, published statements, or any of the things mentioned in the plaintiffs' petition to them, or any of them; and having taken no part in said transactions it cannot be said that they knowingly participated in any of them. There being

nothing in the record sufficient to bring defendants, Yates and Hamer, within the rule of liability announced by the supreme court of the United States in these cases and others, we are of opinion that the judgment, as to them, must be reversed.

As to the defendant David E. Thompson, it appears from the record that he did not sign either of the statements in question. Some evidence was introduced which tends to show that before the last report was signed Thompson had notice of a letter from the comptroller of the currency questioning the correctness of the former reports made to him by the directors, and requiring the bank officers to charge off certain worthless notes or obligations held by that institution: That thereafter Thompson refused to sign any statements to the comptroller of the currency and took no part in the management of the bank; that he disposed of some of his stock; that he was not informed in any way of the fact that published statements of the condition of the bank were sent by any agent or officer of the bank to the plaintiffs, if any such were sent, while it may be said that for a considerable length of time before the bank was closed by the comptroller he had some knowledge that its financial condition was questioned, still, so far as the record shows, defendant Thompson did not personally participate in any of the acts of which the plaintiffs complain and they do not claim that he ever had any conversation with or made any statement whatever to the plaintiffs, or any of them.

As we view the opinion of the supreme court of the United States in *Yates v. Jones Nat. Bank*, supra, there was required in this case of the directors of the bank only that standard of conduct expressly imposed by section 5239 of the Revised Statutes of the United States, and no higher duty may be rightfully established and demanded. A bank director is guaranteed immunity from liability under the very law that permits him to become a director. As an inducement to him to act in that capacity the law assures him that he is not to be liable except for that which he knowingly does. A knowledge must be brought home to the director that he is deceiving the individual wronged and may thereby occasion a loss to him. The director is not liable for his own mistakes or blunders, or for the mistakes or blunders of his brother directors; neither is he liable for the frauds and wrongs of the officers of the bank unless he has personal knowledge thereof or participates in such fraudulent acts. If it were not so there would be great difficulty in securing men to assume the position of national bank directors. The rule for which plaintiffs contend, if carried to its ultimate conclusion, would make the director of the national bank, who has himself been imposed upon and deceived by its officers, and who has thereby suffered loss, liable to the depositors for the fraudulent acts of such officers. Such has not been the views expressed by the supreme court of the United States in any cases. The opinion of Justice White in *Yates v. Jones Nat. Bank*, supra, is based on a single proposition, that is, "Where a statute creates a duty and prescribes a penalty for non-performance

the rule prescribed in the statute is the exclusive test of liability." In the argument on behalf of the appellees it is said: "We sought to avoid the application of this rule for the reason that while the national bank act expressly commanded the publication of the official report, it did not require the publication of a true report and therefore the publication of a false report did not violate any express mandate of the statute." (Cochran v. United States, 157 U. S. 286.) The argument was that the making of a false report was not a violation of the United States bank act and that the remedy provided by section 5239 for violations of the statute did not reach the case and therefore the contention was that there was no statutory remedy for making a false report and that the plaintiffs in the court below could resort to their remedy at common law. This is a sort of legal refinement and the only objection to it is that it does not seem to be along ordinary logical lines. The trouble with this contention is that it would eliminate the federal courts from a construction of the United States statutes and their enforcement. This would make a failure of bank directors to closely observe the terms of the national banking act, though acting under it, an excuse for releasing them from all penalties to be inflicted under the act and by its provisions and the substitution of a different liability from that imposed by the statute.

In *Briggs v. Spaulding*, 141 U. S. 132, the bill was framed upon the theory of a breach by the defendants, as directors of their common law duty as trustees of a financial corporation and of breaches of special restrictions and obligations of the national banking act. There plaintiffs commenced their action under the United States banking act, and claimed a liability of a violation of the same. It was there said that plaintiffs cannot, in an action to recover because of a violation of the banking act, be allowed to recover upon some other theory. The plaintiff may not jumble his causes of action together and then say to the defendant—If you are not liable upon that which I have charged you with, then here is another construction that can be placed upon what I have said, and you are liable under that.

It may be said with much plausibility and reason that it should be the duty of the directors to look into the condition of the bank of which they are directors but that matter seems to have been determined by the supreme court of the United States in the case of *Briggs v. Spaulding*, *supra*, where it was said: "Persons who are elected into a board of directors of a national bank, about which there is no reason to suppose anything wrong, but which becomes bankrupt in 90 days after their election, are not to be held personally responsible to the bank because they did not compel an investigation, or personally conduct an examination." That decision holds that if the bank directors fail to look into the condition of the bank they are not guilty of an ordinary want of care so far as the statute is concerned; section 5239 states in terms the non-liability of bank directors who fail to investigate the conditions of the bank. It may be that when one deposits money in a bank or takes stock in a bank thus putting his property in immediate control of other persons that

he has a right to expect that the directors, who are supposed to manage the bank, will exercise at least ordinary care and prudence in the management of the bank's affairs, but the degree of care required rests of course with Congress which has control of the legislation.

In *Briggs v. Spaulding*, 141 U. S. 132, Chief Justice Fuller, in delivering the opinion of the court, among other things, said:

107 (1) "Our attention has not been called, however, to any duty specifically imposed upon the directors as individuals by the terms of the act. (2) If any director participated in, or assented to, any violation of the law by the board he would be individually

liable. * * * (3) It does not follow that the executive officers should have been left to control the business of the bank absolutely and without supervision, or that the statute furnishes a justification for the pursuit of that course. Its language does enable individual directors to say that they were guilty of no violation of a duty directly devolved upon them." (4) He cites 1 *Morawetz, Private*

Corporations (2d ed.) sec. 556, to the effect that: "The liability of directors for damages caused by acts expressly prohibited by the company's charter or act of incorporation is not created by force of the statutory prohibition. (5) The performance of acts which are

illegal or prohibited by law may subject the corporation to a forfeiture of its franchises, and the directors to criminal liability; but this would not render them civilly liable for damages. (6) The liability of directors to the corporation for damages caused by unauthorized acts rests upon the common law rule which renders every agent

liable who violates his authority to the damage of his principal. * * * (7) The degree of care required (from a bank director)

depends upon the subject to which it is to be applied, and each case has to be determined in view of all the circumstances. (8) They (bank directors) are not insurers of the fidelity of the agents whom

they have appointed, who are not their agents but the agents of the corporation; and they cannot be held responsible for

108 losses resulting from the wrongful acts or omissions of other directors or agents, unless the loss is a consequence of their own neglect of duty, either for failure to supervise the business with attention or in neglecting to use proper care in the appointment of agents.

1 *Morawetz, Private Corporations* (2d ed.), sec. 551, et. seq., and cases. * * *

(9) The relation between the corporation and them (bank directors) is rather that of principal and agent, certainly so far as creditors are concerned, between whom and the corporation the relation is that of contract and not of trust. * * *

(10) There are many things which, in their management, requires the utmost diligence, and most scrupulous attention, and where the agent who undertakes their direction renders himself responsible for the slightest neglect. There are others where the duties imposed are presumed to call for nothing more than ordinary care and attention, and where the exercise of that degree of care suffices. The directors of banks from the nature of their undertaking, fall within the class last mentioned, while in the discharge of their ordinary duties."

The plaintiffs having failed to allege and prove that the defendants personally knew of, or personally participated in, the acts of the officers of the bank of which they now complain, it seems clear that

if we follow the decision of the supreme court of the United States in these cases, they are not entitled to recover, and the judgments of the district court should be reversed as to all of the defendants.

109 It also is apparent that plaintiffs cannot produce any other or additional evidence which will render the defendants liable in these cases and therefore the judgments are reversed and the actions are dismissed. Judgment accordingly.

Reese, C. J., not sitting.

Sedgwick and Fawcett, JJ., dissenting.

110 LETTON, J., concurring in part:

I concur in the view that the amendments made after the remand do not change the issues and only set out more fully a cause of action for deceit at common law. The issues then, are the same as when the case was presented to the supreme Court of the United States. A careful reading of the history of this case set out in the opinions of this court and in those of several inferior federal courts before which the question was presented shows that it was their opinion that the petitions charge only a liability at common law for deceit and not one under the national banking acts. The judgment of this court which was reversed by the supreme court of the United States was based upon the theory that the pleadings contained no federal question and stated merely a common law liability. The Supreme Court of the United States held that a federal question was presented and that "The measure of responsibility, concerning the violation by directors of express commands of the national bank act, is, in the nature of things, exclusively governed by the specific provisions on the subject contained in that act." *Yates v. Jones Nat. Bank*, 206 U. S. 158, 178.

I agree with the former judgment of this court and that of the several inferior federal tribunals before which the question was presented that the petitions state a cause of action at common law for deceit but think this court is bound by the opinion of the supreme court of the United States. I am also inclined to the view that the

evidence would support a judgment upon such a theory of the case. The findings of the district court are to that effect.

111 I am not satisfied they are unsustained by the evidence. The presumption is that they are so sustained, but I have not examined the evidence so critically as would be necessary to determine this for the reason that under the holdings of the supreme court of the United States as to the measure of duty and of liability of directors under the banking laws of the United States, I think a case has not been made. For that reason alone I concur in the conclusion.

* * * * *

112 The undersigned appellee respectfully request- the court to grant a rehearing herein with view to the correction of what we think erroneous interpretations of the decision of the United States Supreme Court in *Yates v. Jones Nat. Bank*, 206 U. S. 158; of the statutes of the United States upon which that case is predicated; of the law concerning the dismissal of this case and of erroneous

construction as to the sufficiency of the evidence to support the findings and judgments of the trial court.

I.

It is said in the syllabus of this case, paragraph two, that "Where, by the federal statute concerning national banks a responsibility is made to arise against the directors from its violation knowingly, proof of something more than negligence is required and it must be shown that the violation was intentional" whereas the correct and proper construction of such statute is, "not * that as a condition of liability there should be proof of something more than reck-
 113 lessness,—not that there should be an intentional violation,—but a violation 'in effect' intentional" and "there is 'in effect' an intentional violation of a statute when one deliberately refuses to examine that which it is his duty to examine" *Thomas v. Taylor*, 32 Sup. Ct. 403.

2.

The deciding opinion in this case concedes that if it be considered as a common law action of deceit, the petition states a cause of action, the evidence is sufficient to support the judgment and consequently the judgment should be affirmed.

It appearing therefore that this case is by the decision of this court, based and predicated upon the national bank act and the violation of the provisions thereof, it follows that the measure of responsibility and rule of liability provided by that act, should be applied, and that in so doing, this court is bound by the United States Supreme Court's construction and interpretation thereof in this case; that this court's construction and interpretation of the national bank laws, Title 62 of the Rev. St. of the U. S. and section 5239 thereof, is in conflict with the decision of the United States Supreme Court in this case and that the plaintiff has therefore been, in effect, denied a right and privilege conferred upon it by the constitution and statutes of the United States; of Title 62 of the Rev. St. of the U. S. and especially section 5239 thereof.

3.

This court has erred in that it has violated the mandate of the United States Supreme Court in this case in that, whereas, by the decision, opinion and mandate of said court this case was reversed and remanded for further proceedings not inconsistent with
 114 the opinion of the said United States Supreme Court, when in fact the proceedings in this case in this court have been and are inconsistent and in direct conflict with the opinion of the United States Supreme Court, in that this court has placed a construction upon the national banking laws in direct conflict with the construction placed thereupon by the United States Supreme Court in this case and that the direct and immediate effect of said erroneous construction has been and is to deny to the plaintiff the right to recover under the national bank laws Title 62 of the Rev. St. of the

U. S. and especially section 5239 thereof, and to nullify the right and privilege conferred upon and granted to appellee thereby.

4.

This court has erred in that by its decision it has denied to the appellee the right to recover under the national bank laws, Title 62 of the Rev. St. of the U. S. and especially Section 5239 thereof, and has nullified the right and privilege conferred upon and given to appellee thereby.

5.

The court erred in not deciding that although this case be considered as predicated on false representations contained in reports published pursuant to the directions of the Comptroller, the evidence and findings of the trial court include every element necessary to sustain recovery under the national bank laws,—“the rule of responsibility declared by them” have “been satisfied” (Thomas v. Taylor) and the judgment should be affirmed.

6.

The opinion of Judge Letton says that under the holdings of the United States Supreme Court as to the measure of duty and
115 liability of directors under the banking laws of the United States a case has not been made,—whereas even though this case be considered as arising under that act and measure of duty and of liability established thereby be applied thereto, we have still made a case and are entitled to an affirmance of our judgment; that is, although the measure of responsibility and the test of liability established by the federal statute be applied to this case our petition states a cause of action and the evidence and findings are sufficient to sustain our judgment.

7.

It is said in the opinion of Judge Hamer that there is nothing in the record sufficient to bring the defendant within the rule of liability announced by the Supreme Court of the United States in this case and others, and that the judgment must therefore be reversed, whereas, the record discloses evidence amply sufficient to sustain judgment against the defendant under the rule of liability and measure of responsibility announced by the Supreme Court of the United States.

8.

It is said in the opinion of Judge Letton that:

“A careful reading of the history of this case, set out in the opinions of this court, and in those of several inferior federal courts before which the question was presented, show that it was their opinion that the petitions charge only a liability at common law for deceit, and not one under the national banking act. The judgment of this court, which was reversed by the Supreme Court of the United States, was based upon the theory that the pleadings con-

tained no federal question, and stated merely a common-law liability. The Supreme Court of the United States held that a federal question was presented, and that the measure of responsibility, concerning the violation by directors of express commands of the national bank act, is, in the nature of things, exclusively governed by the specific provisions on the subject contained in that act." *Yates v. Jones Nat. Bank*, 206 U. S. 158, 178, 27 Sup. Ct. 638, 645 (51 L. Ed. 1002).

I agree with the former judgment of this court, and that 116 of the several inferior federal tribunals before which the question was presented, that the petitions state a cause of action at common law for deceit, but think this court is bound by the opinion of the Supreme Court of the U. S."

Thus assuming and deciding that the United States Supreme Court held our petition necessarily presented a federal question or that it did not state a cause of action for deceit at the common law,—whereas that court did not decide that our petition did not state a cause of action for deceit at the common law, not that it necessarily presented a federal question, but based its judgment and conclusion on the fact that the proof in the record then before it disclosed that plaintiff had relied for recovery, on reports published pursuant to the directions of the Comptroller of the Currency under the requirements of the national bank act. The decision of the United States Supreme Court concedes us the right to maintain this action under the present petition as an action at common law for deceit, provided, the record shows we have not relied for recovery upon any act or duty required or prescribed by the express commands of the federal statutes, i. e. reports published pursuant to the call of the Comptroller. The findings of the trial court show it expressly based our right to recovery upon the voluntary and unofficial statements and reports and not upon the official reports. And the evidence contained in the record sustains the findings and judgments.

9.

It is said in the opinion of Judge Hamer that it was decided by the United States Supreme Court in this case that plaintiffs' petition was insufficient to charge the defendants with a common law liability for fraud and deceit, whereas, that court did not so decide 117 and plaintiff's petition was then and now is sufficient to charge the defendants with a common law liability for fraud and deceit.

10.

In his opinion Judge Hamer says the plaintiff "still charge- the defendants with making false statements to the Comptroller of the Currency as to the condition of the Capital National Bank and this is the main foundation or basis for recovery," whereas the petition does not so charge nor is such charge made the foundation or basis for recovery.

11.

In his opinion Judge Hamer assumes that the United States Supreme Court decided that this case could not be maintained at common law for fraud and deceit, whereas, the Supreme Court did not so decide, but concedes plaintiff the right to maintain this action as at common law for fraud and deceit, so long as recovery is not based upon a violation of any of the express commands of the national bank act.

12.

The opinion of Judge Hamer assumes that the United States Supreme Court decided that this action could not be maintained as arising under the federal statute, whereas, the court did not so hold but concedes the jurisdiction of the state courts,—the only requirements being that the measure of responsibility prescribed by the federal statute shall be observed and applied.

13.

In his opinion Judge Hamer says: "unless the Supreme Court of the United States shall recede from its decision of these cases, the petitions will be held insufficient by that court to state a common law liability for fraud and deceit as against the defendants
118 who were simply directors of the Capital National Bank,"—
thus assuming that that court held the plaintiff's petition did not state a cause of action at the common law for fraud and deceit, whereas, the Supreme Court did not so decide and plaintiff's petition does state a cause of action for fraud and deceit at common law.

14.

This court erred in not deciding that this case could be maintained for fraud and deceit at common law, as predicated upon false representations exclusive of any acts done pursuant to the express commands of the national bank act, and that the evidence and findings of the trial court is sufficient to sustain the judgment on that theory.

15.

It is said in the opinion of Judge Hamer that: "The plaintiffs having failed to allege and prove that the defendants personally knew of or personally participated in the acts of the officers of the bank of which they now complain, it seems clear that if we follow the decision of the Supreme Court of the United States in these cases they are not entitled to recover and the judgments of the District Court should be reversed as to all the defendants." This statement assumes that our petitions failed to allege that the defendants personally know of our personally participated in the acts charged in the petitions whereas such petitions do contain such allegations and do charge the defendants with knowing violations and guilty knowledge.

This statement further assumes that the Supreme Court of the United States decided that in order to sustain recovery under the national bank act it is necessary to allege and prove that the defendants personally knew of or personally participated in the acts charged in the petitions whereas the United States Supreme Court did not so decide and Section 5239 Rev. St. of the U. S. does not so provide.

This statement also assumes that the plaintiffs failed to prove that the defendants personally know of or personally participated in the acts charged in the petition whereas the evidence is amply sufficient to sustain said charge.

16.

The court erred in dismissing this case and if there is reversible error in the record, the case should not be dismissed but remanded to the lower court for further proceedings in accordance with the law.

17.

The opinion of this court seems to be based upon the theory that this case is necessarily controlled by the national bank act; that it must necessarily be tested by the measure of responsibility prescribed in section 5239 Rev. St. of the U. S. that under the interpretation and construction of that statute made by the United States Supreme Court in this case, this court is compelled to hold that recovery cannot be sustained without proof of actual knowledge; that the United States Supreme Court decided in this case that this action could not be maintained as an action at common law for fraud and deceit, and that the *frame* of our petition precluded that view or theory; whereas, the holding of the United States Supreme Court is that this action can be maintained under our present petition as an action at common law for fraud and deceit and that the rule of liability provided by the common law is applicable

120 to such action and that our judgment can be sustained upon that theory provided it does not appear by the record that plaintiff has relied for recovery upon any act done pursuant to an express command of the national bank act; also, that this court has jurisdiction to hear and determine this action as arising under the federal statute and as predicated upon the violation of a duty required by the express commands of the national bank act so long as it properly applies the measure of responsibility and the rule of liability established by that act; and finally that that act does not require proof of actual knowledge but that it is sufficient if it be shown the defendants acted recklessly; that they refused to examine that which it was their duty to examine; or that they disregarded the directions of the officer appointed by the law to examine the affairs of the bank.

18.

The court erred in not deciding that since by their answers the defendants alleged that if they "neglected any duty as such director or stockholder or committed any of the wrongs complained

of in the plaintiff's amended petition, whereby the said bank became insolvent and gave rise to a cause of action against this defendant, sounding in damages * * * And that "if such damages resulted from the conduct or neglect of duty on the part of this defendant, a judgment therefor under the law could only be recovered by the said bank * * * or by the receiver * * *"—they thereby admitted that they neglected their duties as such directors and committed the wrongs complained of in plaintiff's amended petition whereby the bank became insolvent and that such damages resulted from the conduct or neglect of duty on the part of the defendants,—and therefore admitted their liability to the plaintiff under the national banking laws, Title 62 Rev. St. of the U. S. and Section 5239 thereof, and the judgment of the trial court should be affirmed.

Respectfully submitted,

THOMAS BAILEY, *Appellee*,
By R. S. NORVAL &
J. J. THOMAS,
L. C. BURR, *Att'ys.*

* * * * *

123 SEDGWICK, *J.*, dissenting:

It seems to me that the opinion and the concurring opinion are both predicated upon the capital error of assuming that it has been decided by the supreme court of the United States that the action is one for deceit at common law and for that reason cannot be maintained. The opinion says that it was held (by the supreme court of the United States) that plaintiff's petitions were insufficient to charge the defendants with a "common law liability for fraud and deceit", whereas that court held that the action was essentially for a violation of the federal statute, and expressly holds that such actions can be maintained in the state courts, and then reverses the judgment of this court, not because of any defect in the petition, that question not being discussed or even mentioned, but because the trial court erroneously instructed the jury as to liability under the federal statute.

The opinion discusses the proposition somewhat at length and concludes that "unless the supreme court of the United States shall recede from its decision of these cases, the petition will be held insufficient by that court to state a common law liability for fraud and deceit as against the defendants who were simply directors of the Capital National Bank." It seems to me wonderful that any member of the court should so completely misunderstand the opinion of that court. The concurring opinion falls into the same remarkable error, as the first sentence shown. "I concur in the view that the amendments made after the remand do not change the issues, and only set out more fully a cause of action for deceit at common law." This is exactly the reverse of what the supreme court in fact decided. "Directors of a national bank who merely negligently participated in or assented to the false representations

as to the bank's financial condition contained in the official report to the Comptroller of the Currency * * * cannot be held civilly to anyone deceived", etc. *Yates v. Jones Nat. Bank*, 27 Sup. Ct. Rep. 638 (206 U. S. 158.). This is the decision of the merits of the case as stated in the third paragraph of the syllabus. In the opinion the court says that the basis of the assignments of error is found in the instructions given by the trial court and in refusals to give instructions. These instructions and refusals are quoted by the court and they all relate to this one point. Is proof of negligence only sufficient—must the violation of the federal statute be in effect intentional? These instructions and refusals furnish the sole ground for reversal; all other points are resolved in favor of defendant in error. The court said that it was suggested by the plaintiffs in error that the action to enforce a liability created by the federal statute was "so inherently federal" that "the state court was wholly devoid of jurisdiction * * * and that such action could only be brought in the courts of the United States." It was thought sufficient in the opinion to say that such contentions were without merit; but the character of the action, and the right to bring it in the state courts is plainly stated in the fourth paragraph of the syllabus.

125 "State courts may enforce, against directors of a national bank who have made false representations as to the bank's financial condition in the official report to the comptroller of the currency, the civil liability prescribed by U. S. Rev. St., sec. 5239, which * * * makes every director who participated in or assented to the same civilly liable to persons who have suffered damage in consequence thereof." How is it possible that any one should suppose that the court held that the pleadings were defective or that the judgment was reversed because the action was the common law action for fraud and deceit?

It is said in the opinion which has been promulgated as the opinion of this court: "As we view the opinion of the supreme court of the United States in *Yates v. Jones Nat. Bank*, supra, there was required in this case, of the directors of the bank, only that standard of conduct expressly imposed by section 5239 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3515), and no higher duty may be rightfully established and demanded", and this is discussed at length in the opinion. This statement is entirely outside of the case at bar. There is no attempt to establish or demand any higher duty of these directors than is enforced by the federal statute. No action against the directors of a national bank for fraud and deceit at common law can be maintained. This was decided when this case was formerly before the supreme court of the United States and has been since emphatically decided by that court, and no such claim can be made in this case. The question is whether

126 these directors are liable under the federal statute, and this action is prosecuted under that statute to enforce such liability. No action could be presented in any other way.

No one who will take the pains to read the opinion need make such mistakes. If the instructions of the trial court had correctly

stated the law as to liability under the federal statute the judgments would have been affirmed.

When the case was in this court the first time this court followed the law announced in the earlier case of *Gerner v. Mosher*, 58 Neb. 135, and held that in signing the reports to the comptroller of the currency the directors by such act vouched for, or certified to, the absolute truthfulness of the statements therein contained, and not that the report was correct so far as the directors knew or had been advised by the proper performance of their duties as directors. This court thereupon held that the instructions given by the trial court were not erroneous. *Yates v. Jones Nat. Bank*, 74 Neb. 734. The supreme court of the United States reversed the case upon this point only, and held that "where by law a responsibility is made to arise from the violation of a statute knowingly, proof of something more than negligence is required, that is, that the violation must in effect be intentional." To determine the meaning of this language of that court in this case is now the question of law for this court upon this appeal. If there ever was any doubt of the holding of that court

upon this point that doubt has emphatically been set at rest
127 by a later decision where the language used by that court in this case is quoted and its meaning fully stated and made plain. *Thomas v. Taylor*, 224 U. S. 73. It was afterwards taken to the appellate division and to the court of appeals of that state. The court of appeals adopted the opinion of the appellate division and the supreme court of the United States affirmed the decision of that court. It appears that the action was begun as a common law action for fraud and deceit and was substantially so prosecuted in the trial court, and when it reached the appellate division it was insisted that it could not then be considered as an action to enforce the liability imposed by the federal statute. The state court held that a common law action for fraud and deceit could not be sustained against the directors of a national bank but that "a judgment in an action against such directors, tried and determined in accordance with common law principles for publishing a false report which induced the plaintiff to purchase stock in the bank will not be reversed when the case, both as to pleading and proof, meets the statutory requirements, especially when defendants do not claim to have been prejudiced by the theory upon which the action was tried. A right decision will not be reversed merely because a wrong reason has been assigned therefor." (124 App. Div. (N. Y. 53.) The supreme court of the United States approved this holding, and again decided that no common law action for fraud and deceit could be maintained, and
128 yet this court states as a reason for reversing this judgment that "unless the supreme court of the United States shall recede from its decision of these cases, the petitions will be held, insufficient by that court to state a common law liability for fraud and deceit as against the defendants, who were simply directors of the Capital National Bank." That court in this very case had decided that no possible allegation can be sufficient to state such com-

mon law liability; that is, that no common law action could be sustained.

The case of *Thomas v. Taylor*, 224, U. S. 73, will leave no possible room for doubt as to the measure of liability of the directors in making these reports to the comptroller. In that case, as in the case at bar, the assets of the bank had become depleted and the reports to the comptroller misrepresented the condition of the bank. The plaintiff had not seen the reports to the comptroller, but had been informed of their contents, and purchased some of the stock of the bank relying upon the statements in those reports. On account of the false reports he was compelled to pay an assessment upon the stock which he bought and brought his action to recover damages so sustained. In the syllabus the court stated the law as follows: "Although the common law action of deceit does not lie against directors of a national bank for making a false statement, and the measure of their responsibility is laid down in the National Banking Act, *Yates v. Jones Nat. Bank*, 206 U. S. 158, an action may be maintained in the state court regardless of the form of pleading if the pleading itself satisfied the rule of responsibility declared by that act. There is, in effect, an intentional violation of a statute when one de-

129 liberately refuses to examine that which it is his duty to examine." The opinion is devoted largely to an explanation of the holding in the case at bar when it was before that court. The court said: "The contention goes beyond what was said in *Yates v. Jones Nat. Bank*. The language there is 'that where byn law a responsibility is made to arise from the violation of a statute knowingly, proof of something more than negligence is required—that is, that the violation must in effect be intentional.' Not, therefore, that as a condition of liability there should be proof of something more than recklessness; not that there should be an intentional violation, but a violation 'in effect' intentional. There is 'in effect' an intentional violation of a statute when one deliberately refuses to examine that which it is his duty to examine." And again, the court said: "There was an issue of knowledge tendered by the pleadings, and to sustain their side of the issue plaintiffs in error offered testimony of the correctness of the books and to show that the report was a true copy of them, as it was alleged in their answer to be."

The case at bar is quite similar. There is evidence that the comptroller became dissatisfied with the conditions of the bank and wrote to the officers of the bank to call the attention of the directors to its condition and to send a statement of what they found to the comptroller. This was done and these defendants signed the statement to the comptroller. It is therefore conclusive that these defendants knew the condition of the bank. After this the reports were

130 published as before, and the plaintiffs were deceived and damaged thereby. There is a large mass of evidence in the case, but it is useless to discuss it in view of the total inadequacy of the opinion and concurring opinion to discuss or even to state the questions of law upon which the decision depends.

Fawcett, J., concurs.

* * * * *

131-133 It is by the court ordered that oral argument on the motions of appellees for rehearing herein, be had before the court at the session of court commencing June 2, 1913.

M. B. REESE,
Chief Justice.

* * * * *

134 This cause coming on to be heard upon motion of the appellee for a rehearing herein, was argued by counsel and submitted to the court and a vote of the judges was had and taken upon a motion to allow a rehearing, and Judges Barnes, Hamer and Rose voted against allowing a rehearing (and Judges Sedgwick, Letton and Fawcett voted to allow a rehearing) and thereupon Chief Justice Reese voted in favor of allowing a rehearing and declared said motion to be carried; upon due consideration whereof the court doth find probable error in the judgment of the court heretofore entered herein; it is, therefore ordered and adjudged that said motion of appellee for a rehearing be and the same hereby is allowed and a rehearing herein ordered.

J. FAWCETT,
Acting Chief Justice.

* * * * *

135 The appellants, Charles E. Yates and Louisa P. Hamer as administratrix of the estate of Ellis P. Hamer, deceased, each separately moves the court to set aside, vacate and hold for naught so much of the record and proceedings of January 7, 1914 as shows the motion for rehearing was declared carried and orders a rehearing to be had for the reasons which follow this and the other two motions.

136 2. The appellants Charles E. Yates and Louisa P. Hamer as administratrix of the estate of Ellis P. Hamer, deceased, each separately moves the court to vacate, set aside and hold for naught the order of May 17, 1913 ordering an oral argument upon a motion for rehearing in this action for the reasons following this and the other two motions.

3. The appellants Charles E. Yates and Louisa P. Hamer as administratrix of the estate of Ellis P. Hamer, deceased each separately moves the court to correct the proceedings and order of the court of January 7, 1914 so as to eliminate therefrom the deciding vote of the Chief Justice, the Honorable Manoah B. Reese from said order and proceedings and from the tie vote of the remaining six judges who heard and considered this case to overrule the motion of appellees for rehearing and to order the issuance of the mandate of the court to execute and carry into effect the former judgment of this court of January 31, 1913 reversing the judgment of the district court and dismissing the action, for the following reasons.

1. The deciding vote of Chief Justice Reese ordering and allowing the rehearing, is without authority and void because of his disqualification on account of having been attorney for the plaintiff on the subject matter of this action and proceeding as declared by

him from the bench in the presence and with the knowledge of the other judges in the open session of the court when the cases for the first time appeared before the court on the formal motion to advance for an early hearing.

2. The deciding vote of the Chief Justice is in violation of Chap. 19, Sec. 37 of the compiled Statutes of Nebraska, which provides that "a judge or justice is disqualified from acting as
137 such * * * in any case * * * where he has been attorney for either party in the action or proceeding," without the mutual consent of all the parties which was never had in any form nor entered of record or made in writing in this action, and said vote was an action by the Chief Justice as a Judge or Justice in this action and in the proceeding therein of considering and ordering a rehearing.

3. The deciding vote of the Chief Justice on the order for rehearing, is in violation of art. 6, sec. 2 of the Constitution of this state which provides,—“The Supreme Court shall consist of seven judges; and a majority of all elected and qualified judges shall be necessary to constitute a quorum or pronounce a decision,” and it required the vote of four qualified judges of this court to carry the motion and to make the order for a rehearing which quorum and majority vote was not cast as is shown by the order and proceedings of the court of January 7, 1914 and by the showing filed herewith in support of this motion.

4. The declaration of the Chief Justice of his disqualification and repeated retirement from the bench upon all of the public hearings of this case, which was acquiesced in and approved by the six judges who heard the case, and by counsel for all the parties, is an adjudication by the court of such disqualification which prevents counting the vote of the Chief Justice on the motion for rehearing and required the order to be entered on the tie vote of the other six judges that the motions stand overruled and the former judgment adhered to.

5. It is now disclosed by the record and proceedings of this court that the six judges who were authorized and qualified to hear
138 and determine the motion for rehearing cast their votes three for rehearing and three against it, which by law and the well recognized rule and practise of this court and courts in general, had the legal effect of overruling the motion for rehearing and of adhering to and making effective the former final judgment of this court, which reversed the judgment of the district court and dismissed the action, and of dismissing these appellants without day, which rule was illustrated and applied in *Shumway vs. State*, 82 Neb. 152, 165.

6. These appellants had no knowledge or information, either personally or by counsel that the Chief Justice would act or participate or had acted or participated, in any of the matters or proceedings in this case and had no reason to challenge or object to such action, until it first appeared in the proceedings and order of January 7, 1914, and they at all times relied upon his own stated disqualification that he would not so act.

7. The order of May 17, 1913 directing re-argument of the motion for rehearing, is null and void and should be set aside for the reasons above stated.

8. The order of May 17, 1913, was as the appellants believe, carried only by the participating and deciding vote of the Chief Justice, which does not appear upon the record, but rests within the judicial knowledge of the court and of each one of the other six judges who participated in and considered that order, all of which was without the knowledge or consent of these appellants, either personally or by counsel and is only now disclosed by the record of the proceedings upon the order of January 7, 1914 and there was no opportunity or occasion so far as the appellants personally or by counsel know, to challenge or object to such action of the Chief Justice on the order of May 17, 1913.

9. That the record, proceedings and order of January 7, 1914 allowing a rehearing should be amended and entered on the journal as the tentative order is now drawn by the clerk of the court with the exception that it should not recite "Was argued by counsel," and after reciting the vote of the six judges, should read,— "And thereupon, upon due consideration whereof the court does not find probable error in the judgment of the court heretofore entered herein and the motion of appellee for rehearing having failed to receive the vote of the majority of the qualified judges of this court in support thereof, the same stands overruled and it is therefore ordered and adjudged, that said motion of appellee for a rehearing be and the same is overruled, and a rehearing denied and the former judgment of this court stands approved and the clerk is hereby directed to issue a mandate to the District Court of Seward County to execute and carry into effect the prior judgment of this court as directed in the majority opinion therein."

FRANK E. BISHOP,
FRANK M. HALL,
Attorneys for Appellants.

* * * * *

147 REESE, C. J.:

In view of the controversy with reference to my action in voting to allow a rehearing in this cause, I deem it but just to all concerned that I make this statement to go upon record.

First, when the case was called I did say that I had been consulted by one of the plaintiffs and felt that I ought not to take any part in the decision of the case, and, on each occasion when the case came up for consideration in any form, if in court I withdrew, if in the consultation room I kept silent. I was acting in entire good faith and believed that I should take no part in the decision.

When the matter of allowing an argument on the motion for rehearing came up, I found the judges divided, and, as allowing the argument could have no necessary bearing upon the merits of the case, I felt free to so vote as to allow a full investigation of the case, and voted to allow the argument. In this I believed then and still

believe that I discharged a plain duty. I took no further action in the matter. The motion was argued in my absence and when the question of granting the rehearing came up I found by the discussion that Judges Letton, Fawcett and Sedgwick each desired the rehearing, Judges Barnes Hamer and Rose opposing it. Judges Barnes and Hamer, while protesting against my vote did it in a gentlemanly and personally friendly way. I stated that the vote would not be completed then and that I would take time to consider the matter more fully, and that when I did vote it would be upon my own judgment. The matter went over to a later sitting. A few days thereafter I met Judge Deemer, at a meeting of the State Bar Association at Omaha, a long time member of the Iowa Supreme

148 court and former Chief Justice thereof, and in whose integrity and ability, I, with all others so far as I know, have the fullest confidence, and I presented the matter to him without naming the case nor the issues involved and asked his judgment as to my duty. He frankly gave it, saying that the question was upon a matter of procedure only and had nothing to do with the merits of the case, and if three judges were requesting the opportunity for further investigation, he thought I should vote to give it to them. When the question again came up I stated to all my associates the conversation with Judge Deemer, his judgment in the matter, which agreed with my own, and I should and did vote upon the motion by which the rehearing was granted. I did what I conceived to be my plain duty in the matter. If I erred, the error was my own. I cannot conceive of an occasion ever arising where three of my associates are demanding an opportunity to further hear and investigate a cause as against three who desire to deny that right, that I should remain silent and by my silence deny that right, even though I may be disqualified to pass upon the merits of the case.

It is my belief that a case is pending until the doors of the court are finally closed against it. The filing of an opinion, either affirming or reversing a judgment of the district court is but one of the steps in the litigation, subject to be overturned or modified should a rehearing be granted and the case heard further. If upon an application for rehearing the six judges are equally divided and this should be held to be a refusal to rehear the case, the doors of the court are effectively closed by the three judges, and the decision is, in effect, rendered by the three, while the constitution and statutes require the concurrence of four.

In conclusion I think I ought to say a word as to an error into which I did fall. It is true that I stated from the bench
149 that I had been consulted in the case and should not take any part in the hearing. It is true that I invariably left the court room on each occasion when the case was up for argument and never at any time took any part in the discussion of the merits of the case.

At the time of the failure of the Capital National Bank of Lincoln, over twenty years ago, Mr. Jones of the Jones National Bank of Seward applied to me to assist in procuring a return to him of certain remittances which he had made to that bank after its failure,

perhaps on the day its doors were closed. I went to the bank, I think alone, but Mr. Jones may have been with me, when assurance was given by the National Bank examiner that the Jones National Bank would be protected and that the remittances so made would not go into the bank funds. I am not very clear as to the details of what occurred at the bank, but my recollection is that the Jones mail was surrendered unopened and carried away. As to this I am not entirely certain. At that time Mr. Jones said something about bringing a suit for his previous deposits in the bank. I told him I would not do it, saying he would become involved in long, tedious and expensive litigation, and the subject was dropped. Upon reflection I recall that what I did for Mr. Jones was a neighborly act, that I neither charged nor received any compensation therefor. When this case came up before the court I concluded that the suit above referred to had been brought and that this was the case. So believing, I declined to take part in the hearing. The whole matter had practically left my mind. I now see by the records that this action was commenced more than two years after the bank failure, by other attorneys. I was never at any time consulted by Mr. Jones nor his counsel as to the bringing or maintaining of this
 150-180 suit—never employed as attorney or counselor and have known nothing of the case. My error was in supposing that this suit was based upon the matters spoken of by Mr. Jones to be at the time referred to. So far as I now know I never knew any of the plaintiffs nor officers of the other banks, nor did I ever consult, nor was I consulted by any of them, save alone by Mr. H. T. Jones upon his own matters, "as above stated."

* * * * *

181 Supreme Court of Nebraska, January Term, A. D. 1914,
 Apl. 3.

No. 17279.

*THOMAS BAILEY, Appellee,
 v.

CHARLES E. YATES et al., Appellants.

Appeal from the District Court of Seward County.

The motion of appellant to set aside the order of January 7, 1914, granting a rehearing sustained. Thereupon it was moved by Sedgwick, J., as follows:

"Whereas it appears that there is not a constitutional majority of this court who think that the findings and judgment of the district court ought to be reversed, and this court now has
 182 full jurisdiction of these cases; I move that the former judgments of this court reversing and dismissing these cases be

*Reese, C. J., not sitting.

vacated and set aside and the cases resubmitted for further consideration and final decision."

On this motion the court being equally divided, the motion is declared lost, and a rehearing denied.

J. FAWCETT,
Acting Chief Justice.

And on the same day there was filed in the office of the clerk of said Supreme Court a certain written statement made by Hon. Samuel H. Sedgwick one of the Judges of said Court and which statement was entered of record on the Journal of said Court and is in the words and figures as follows to wit:

Supreme Court of Nebraska, January Term, A. D. 1914, Apl. 6.

No. 17279.

THOMAS BAILEY, Appellee,

v.

CHARLES E. YATES et al., Appellants.

Appeal from the District Court of Seward County.

SEDGWICK, J.:

If the three members of this court who consider the findings and judgment of the trial court ought to be reversed insist that the former judgment of this court reversing the trial court shall stand and a mandate shall be sent down reversing the trial court, I think it is my duty to place upon record a brief statement of my views in the matter.

After the order had been entered reversing the findings and judgment of the trial court, one of the four judges who had
183 made that order found matters in the record which convinced him that the order was wrong, and voted for a rehearing. As this left only three members of the court who held that the findings and judgment of the trial court ought to be reversed, I supposed as a matter of course that there would at once be an unanimous court to set aside the former order reversing those findings and judgment. The general practice of this court had been to consider any proposed order or judgment defeated unless a constitutional majority supported such order or judgment. This practice applied under the above circumstances would result in sending down a mandate reversing the findings and judgment of the trial court while this court had full jurisdiction of the whole matter and no constitutional majority of the judges considered such reversal right. Such a thing had never been done before so far as I know and it did not occur to me that any judge of this court would consent to such a result. In most cases the practice of taking no affirmative action without the support of a constitutional majority is wholesome and generally results in justice. But to apply such a practice when it results in

reversing the findings and judgment of the trial court without a majority in favor of so doing seems to me to make use of a technicality for an improper purpose. In saying this I do not adopt the suggestion of plaintiff's brief that it indicates an unusual interest in this particular case on the part of the judges who refuse to concur in setting aside the former order of this court. I think that such suggestions are improper; that each member of the court should be free to act as his judgment dictates. The position they take however is without any precedent in this or any other state, so far as I know.

In the case of *Shumway v. State*, 82 Neb. 152, after full investigation, it was found that only three members of the court thought the verdict and judgment of the trial court ought to be reversed, and those who thought there should be an affirmance were so fully advised that they were unwilling to delay for further investigation. Therefore, there could not be a majority for reversal in any event and the judgment was affirmed. The constitution provides that "a majority of all the elected and qualified judges shall be necessary to constitute a quorum or pronounce a decision." Art. VI, sec. 2. These cases were brought here to obtain a decision that the judgments of the district court be affirmed or that they be reversed. The court still has jurisdiction of the cases, and is enforcing a decision that reverses the district court while there is not a majority of the court who consider it right to do so, but it cannot be corrected because of a technicality of practice. I did not suppose that any one would insist upon such a technicality, and thought that an order properly framed to set aside the former order of this court would be unanimously concurred in, and that the cases would be fairly re-submitted for consultation, discussion and final decision by the court. I think that the motion to set aside the former orders of this court should be sustained.

J. FAWCETT,
Acting Chief Justice.

And on the same day there was filed in the office of the clerk of said Supreme Court a certain written statement made by Hon. John B. Barnes, one of the Judges of said court and which statement was entered of record on the journal of said court and is in the words and figures as follows, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1914, Apl. 3.

185

No. 17279.

THOMAS BAILEY, Appellee.

v.

CHARLES E. YATES et al., Appellants.

Appeal from District Court, Seward County.

BARNES, J.:

When this case was decided a constitutional majority of the court adopted the opinion reversing the judgment of the district court, and

judgment was rendered accordingly. A motion for a rehearing was presented, and on that question the court was equally divided. A motion was then made to vacate and set aside the former judgment. The court being equally divided, the motion was lost. The motion for a rehearing having been declared lost our former judgment reversing the judgment of the district court stands unchanged for want of a constitutional majority to set aside the same.

J. FAWCETT,
Acting Chief Justice.

And on the same day there was filed in the office of the clerk of said Supreme Court a certain written statement made by Hon. William B. Rose, one of the Judges of said Court and which statement is in the words and figures as follows, to-wit:

No. 17276.

JONES NATIONAL BANK

v.
YATES.

No. 17277.

BANK OF STAPLEHURST

v.
YATES.

No. 17278.

UTICA BANK

v.
YATES.

No. 17279.

BAILEY

v.
YATES.

ROSE, J.:

Plaintiffs question the propriety of further judicial participation by me in this case and suggest as reasons that I am interested in the result; that my personal relations with defendant Thompson are intimate; that my attitude has been that of a partisan and an advocate; that in former stages of the litigation I assisted in preparing briefs; and that my brother is an attorney for a party to the suits. These suggestions were made after I had participated, without objection, in the determination of these cases and had voted against plaintiffs' motions for a rehearing. While the disqualifying imputations are without proof, I am prompted by a

solemn sense of duty to make and place on record the following statement:

I have never had any interest, direct, remote or contingent, in any litigation, business or property of any party to these suits and I am personally indifferent to the result.

I have never been on intimate relations of any kind with any of the suitors. Though I have had a speaking acquaintance with defendant Thompson for nearly a quarter of a century, I am confident we have never conversed with each other more than thirty minutes altogether during that entire time.

I have never assisted in any way in the preparation of any brief for any party to these suits nor rendered any service therein for any attorney or party. My brother and I have never been partners in any business or profession, and have never officed together.

While the legislature has prescribed the disqualifications of judges, the lawmakers have not excused a judge of the supreme court from participating in a case wherein his brother appears as an attorney. Longing to avoid a situation so sensitive, I took counsel of my associates soon after I became a judge, but was not excused by
187 them from judicial responsibility on account of my brother's appearance for suitors. Since then the legislature has been in session three times without changing the statute on this subject. I have followed the law and the custom established by Judge Maxwell, Judge Norval and Judge Barnes. I always decline, however, to participate in such cases, where a decision by a constitutional majority can be rendered without my vote. In cases where my associates are equally divided, perhaps not as often as once a year, I remain silent during the argument and the consultation, but vote after a full investigation.

I rely implicitly and fearlessly on my own rectitude and on the ethical purity of all of my judicial acts and conduct. As a judge I can not permit groundless accusations to control or influence me in the performance of my public duties.

* * * * *

188 1. Comes now the appellee herein and moves the court for a rehearing of the motion filed by appellants to set aside the orders of court herein of date May 17th, 1913, and January 7th, 1914, granting a rehearing in these actions, for the following reasons, to-wit:

2. After appellee had filed their briefs herein in opposition to appellants' motions to set aside the orders of May 17th 1913, and January 7th, 1914, the several appellants filed additional briefs herein on the 28th day of February, 1914, and appellee herein had neither time nor opportunity to file a brief in reply thereto.

3. A motion for rehearing should be granted herein because appellants have found a number of important and controlling decisions that the court herein should consider in these premises that in the hurry and press occasioned by the filing of appellants' briefs heretofore mentioned could not have been found and were not known to appellee which said new matter consisted in part of the alleged law

that after a judge had once withdrawn from a case that he had no right to his proper consideration thereof, or to his presence in the case under our constitution.

4. That in view of the importance of the several matters involved herein, a full mature and careful consideration should be had upon a rehearing granted.

5. Because only three members of the court has set aside the order granting a rehearing herein and a constitutional majority of the court has concurred in granting a rehearing.

6. A constitutional majority of the court granted a rehearing in this action, and a constitutional majority of the court has not concurred in denying the motion of appellee for a rehearing.

7. Because Chief Justice Reese was qualified to sit as a judge of the court granting such order, and appellee had and now has a constitutional right to have him give due consideration to this whole case.

8. Because said order of court deprives appellee of his property without due process of law.

9. Because said order is prohibited by and in conflict with the Fourteenth amendment to the Constitution of the United States and denies to appellee equal protection of law and deprives appellee of his property without due process of law.

10. Because appellants' motion to set aside the order of January 7th, 1914, granting appellees a rehearing was based solely upon the ground, that the chief justice was disqualified from participating in said order, for the reason that he had been consulted in the suit by one of the parties, and appellants' brief in support of said motion was based solely on said proposition. Whereas, in appellants' reply brief it is urged that the Chief Justice was disqualified from participating in the order granting a rehearing, for the reason that his withdrawal from participation until after the *casus* had proceeded to final judgment operated as a judicial determination of his disqualification and effectually excluded him from further participation, although no facts existed constituting a disqualification, and although the Chief Justice' withdrawal was based upon a mistake of facts.

That said reply brief tendered issued not raised in appellants' motion and appellees had no opportunity of meeting the issue thus tendered.

11. The record herein discloses that when the Chief Justice withdrew from the consideration of these cases he was not in fact disqualified, but was acting under a mistake of fact; that upon his discovery of the true facts it was his duty to participate in the decision of said cases. a And appellee had a constitutional right to all the judges in this court sitting in his case.

THOMAS BAILEY, *Appellee*;

By J. J. THOMAS,

R. S. NORVAL,

L. C. BURR,

His Attorneys.

191 This cause coming on to be heard upon motion of appellee
for a rehearing and leave to file additional briefs on motion
of appellants to set aside the order of the court of date January 7,
1914, granting a rehearing, was submitted to the court; upon due
consideration whereof, it is by the court ordered that said

192 motion be, and the same hereby is, overruled.

Sedgwick, J., dissenting.

J. FAWCETT,
Acting Chief Justice.

* * * * *

193 & 194

EXHIBIT "A."

H. C. Lindsay, Clerk Supreme Court, Nebraska.

In the Supreme Court of Nebraska.

THOMAS BAILEY, Appellee,
vs.

CHARLES E. YATES et al., Appellants.

Petition for Writ of Error.

To the Honorable Jacob Fawcett, Acting Chief Justice of the Supreme Court of Nebraska:

Your petitioner respectfully represents that in the judgment, decision, record and proceedings in the above entitled cause, which was decided and determined by the Supreme Court of the State of Nebraska, and judgment and reversal and dismissal rendered therein January 31st, 1913, and in which a motion for rehearing in said court was overruled on April 3, 1914, at which time the judgment of said court became final, which said Supreme court of the state of Nebraska is the highest court in which a decision or judgment could be had in said action.

Your petitioner further shows that in the rendition of said judgment by said Court there was necessarily drawn in question the construction of statutes of the United States and the decision of said court was against the right, title and privileges specially set up in said suit and claimed by your petitioners under such statutes, all of which is more particularly set forth in the assignments of error filed herewith and made a part hereof.

And whereas manifest error hath happened as appears from said judgment, decision and record and in the assignment of errors presented herewith, to the great damage of your petitioners.

Wherefore petitioner prays the allowance of a writ of error removing the record and proceedings in this suit to the Supreme Court of the United States for its revision and correction; that a citation

be directed to the above named appellants for their due appearance in said Supreme Court and for supersedeas therein.

J. J. THOMAS &
L. C. BURR,
Attorneys for Appellee.

Lincoln, Nebraska, April 27, 1914.

Writ of error and citation in the within named cause allowed and ordered to issue.

JACOB FAWCETT,
Acting Chief Justice of the Supreme Court of Nebraska.

[Endorsed:] 17279. Bailey v. Yates. Petition for Writ of Error. Supreme Court of Nebraska. Filed Apr. 27, 1914. H. C. Lindsay, Clerk.

* * * * *

195

EXHIBIT "B."

H. C. Lindsay, Clerk Supreme Court, Nebraska.

In the Supreme Court of Nebraska.

No. 17279.

THOMAS BAILEY, Appellee,
vs.

CHARLES E. YATES et al., Appellants.

Assignments of Error.

Comes now the said Thomas Bailey, Appellee in the above named court and assigns the following as manifest error upon the face of the record, to be corrected in the Supreme Court of the United States, to which this cause is to be removed on a writ of error duly allowed for this purpose, to-wit:

1. The Supreme Court of the State of Nebraska erred in rendering the judgment in favor of appellants and in dismissing said action.

2. The Court erred in deciding that the petition of appellee did not state facts sufficient to constitute a cause of action in favor of appellee and against appellants or either of them.

3. The Court erred in deciding that "where by the federal statutes concerning national banks a responsibility is made to arise against the directors from its violation knowingly, proof of some thing more than negligence is required, and it must be shown that the violation was intentional." The correct and proper construction of said statute being "not therefore that as a condition of liability there should be proof of something more than recklessness—not that there should be an intentional violation, but a violation 'in effect' intentional. There is 'in effect' an intentional violation of a statute

when one deliberately refuses to examine that which it is his duty to examine."

4. The Court erred in that it has violated and disobeyed the mandate and decision of the United States Supreme Court in this case, in that, whereas by the mandate and decision of that court this case was reversed and remanded for further proceedings not inconsistent with the decision and opinion of said United States Supreme Court, the proceedings, decision, opinions and judgment in this case in this court are in direct conflict and inconsistent with the opinion and decision of the United States Supreme Court & in violation and disobedience of its mandate; that this court has placed a construction and interpretation upon Section 5239 Revised Statutes of the United States in conflict with and opposition to the decision of the United States Supreme Court in this case, and as a result thereof appellee has been denied a right especially set up and claimed under sections 5211 and 5239, Revised Statutes of the United States.

5. The Court erred in deciding that in order to sustain an action against appellants for making and publishing false statements of the financial condition of the bank in their reports made and published pursuant to the order and command of the Comptroller of the Currency, it was necessary that such false statements should be made with "personal knowledge of their falsity."

6. The Court erred in deciding that in order to bring appellants within the rule of liability announced by the Supreme Court of the United States in this case, it was necessary that such defendants should have had personal knowledge of the falsity of their reports.

7. The Court erred in finding and deciding that the evidence in the record is not sufficient to sustain appellee's judgment against appellants and each of them, under sections 5211 and 5239 Revised Statutes of the United States.

196 8. The Court erred in finding and deciding that the evidence in the record is insufficient to charge appellants with having knowingly made and published false statements of the financial condition of the Capital National Bank, or with knowingly permitting the officers, agents or servants of said Bank to make and publish such false statements, or with participating in or consenting thereto.

9. The Court erred in deciding that the provisions of section 5239 Revised Statutes of the United States, are exclusive of the common law action for fraud and deceit as to false statements and representations of the financial condition of a national bank, made voluntarily & wholly outside of the requirements of the national banking act and not pursuant to the call of the Comptroller of the Currency or other proper official.

10. The Court erred in deciding that appellee's petition is insufficient to state a cause of action at the common law for fraud and deceit, or that the decision of the United States Supreme Court in this case, so decided.

11. The Court erred in deciding that the evidence in the record is insufficient to sustain appellee's judgment against appellants and each of them, because its decision is based upon an erroneous in-

terpretation and construction of section 5239 Revised Statutes of the United States, and the decision of the United States Supreme Court in this case, in that it has assumed that in order to sustain recovery it must appear that appellant directors had personal knowledge of the falsity of their statements—"that knowledge must be brought home to the director that he is deceiving the individual wronged and may thereby occasion a loss to him"—or that the director must personally participate in the act complained of.

By reason of said erroneous decision appellee has been denied a right specially set up and claimed under said Section 5239 Revised Statutes United States.

12. The Court erred in not deciding that after receiving the letters from the Comptroller of the Currency, shown by the record it was the duty of appellant directors to enter upon some reasonable examination and investigation of the affairs and financial condition of the Bank; and that their deliberate refusal or failure to so do, constituted "in effect" an intentional violation of Section 5239 Revised Statutes United States, and if, without so doing, they thereafter make false statements of its financial condition, or permit any of its officers, agents or servants to make the same, or if they assent thereto, they become liable in their individual capacity under section 5239, Revised Statutes of the United States to depositors of the Bank for all damages sustained in consequence of such violation, even if they did not know the statement to be false.

13. The Court erred in not deciding that where a director of a national bank, through his own recklessness or deliberate disregard of duty, is wholly ignorant of the affairs and financial condition of the bank, and conscious of his ignorance, makes or attests a statement of its financial condition, without knowing whether it be true or false, and it is actually false and untrue, he is guilty of a false representation, knowingly made, and liable under section 5239 Revised Statutes of the United States.

14. The court erred in deciding that appellants Yates and Hamer did not knowingly violate any of the provisions of section 5239 Revised Statutes of the United States, although they each attested published reports of the financial condition of the Capital National Bank which were admittedly false and untrue, after receiving the letters from the Comptroller of the Currency shown in the record.

15. The Court erred in deciding that the appellants and each of them did not knowingly violate any of the provisions of section 5239, Revised Statutes of the United States, although they each permitted the officers, agent- and servants of the Capital National Bank to make and publish false statements of its financial condition, and assented to and acquiesced in the same, after receiving the letters from the Comptroller of the Currency shown in the record.

197 16. The Court erred in not deciding that where a director of a national banking association, who has paid no attention to its affairs and is ignorant of its financial condition, makes or attests a statement of such condition, in which he represents a material fact to be true to his personal knowledge, as distinguished from belief or opinion, when he does not know whether it is true

or false, and it is actually untrue, he is guilty of a falsehood, knowingly made, even if he believed it to be true. That after receiving the letters from the Comptroller of the Currency, shown by the record, it was his duty to enter upon the discharge of his duty and acquaint himself with the affairs of the association and that his failure to so do is gross negligence and recklessness or a deliberate refusal to perform such duty and constitutes an intentional violation of Section 5239 Revised Statutes of the United States.

And if thereafter he makes or attests statements of its financial condition or permits its officers, agents or servants to do so, and such statements are in fact false and untrue, he is liable under Section 5239 Revised Statutes of the United States in his personal and individual capacity for all damages which a depositor may have suffered in consequence of such false representation, regardless of whether or not said director had actual personal knowledge of its falsity.

17. The Court erred in not deciding that under the findings of fact of the trial court in this case, appellee's judgment should have been affirmed.

18. The Court erred in not deciding that the findings of fact of the trial court contain every element necessary to sustain appellee's judgment, under Section 5239 Revised Statutes of the United States, and as such are supported by the evidence.

19. The Court erred in deciding that in order to incur liability under Section 5239 Revised Statutes of the United States for the making or attesting of a false statement of the financial condition of a national banking association, it is necessary that the one making or attesting such statement should have actual personal knowledge of the falsity thereof.

20. The Court erred in not deciding that by their attestation of the official published report shown by the record, the appellant directors affirmed and represented they had actual knowledge of the financial condition of the bank and of the truthfulness of said statement, and if they made the same recklessly, without knowledge of its truth or falsity, or conscious that they had no knowledge of its truthfulness, they are guilty of a false representation in effect knowingly made and liable under Section 5239 Revised Statutes of the United States.

21. The Court erred in deciding that the allegations of appellee's petition are insufficient to sustain the judgment against appellants under Section 5239 Revised Statutes of the United States.

22. The judgment of reversal and dismissal is erroneous because the opinion of Hamer J. as to the findings of fact is not concurred in by a constitutional majority of all the elected and qualified judges of this court—Letton J. having only concurred on the law—and therefore the findings of fact of the trial court have not been reversed or modified but stand approved and affirmed by this court.

23. The Court erred in reversing appellee's judgment and dismissing the case because the judgment is not concurred in and supported by a majority of the duly elected and qualified judges of this court as provided in Article VI Section 2 of the Constitution of the

State of Nebraska—whereby appellee has been deprived of his property without due process of law and denied the equal protection of the laws, all of which is prohibited by and in conflict with the 14th amendment to the constitution of the United States.

This court still had jurisdiction of this case at the time it came on for final determination on appellee's motion for a rehearing and when the final order was made herein, there was not a majority of the court who were in favor of or concurred in the reversal and dismissal of this case.

24. The Court erred in not deciding that appellee's petition states a cause of action against appellants whether attested by the requirements of the national banking act or the common law action for fraud and deceit and in assuming that the United States Supreme Court decided appellee's petition did not state facts sufficient to constitute a cause of action at the common law for fraud or deceit.

25. Your petitioner further shows that in the rendition of said judgment by said court—

There was drawn in question the validity of an authority exercised under the United States, and the decision of said court was against its validity.

There was necessarily drawn in question the construction and application of the Statutes of the United States and the decision of said court was against the right, title, and privileges especially set up in said suit and claimed by appellee under said statutes.

Wherefore appellee prays that the judgment of this court may be set aside and reversed and that the judgment rendered in its favor in the District Court of Seward County be affirmed.

J. J. THOMAS &

L. C. BURR,

Attorneys for Appellee.

[Endorsed:] 17279. Bailey v. Yates. Assignments of Error. Supreme Court of Nebraska. Filed Apr. 27, 1914. H. C. Lindsay, Clerk.

199-210 And on the same day there was rendered by said supreme court and entered of record upon the journal thereof a certain Order, in the words and figures following, to-wit:

Supreme Court of Nebraska, January Term, A. D. 1914, Ap'l 27.

No. 17279.

THOMAS BAILEY, Appellee,

v.

CHARLES E. YATES et al., Appellants.

Appeal from the District Court of Seward County,

This cause coming on to be heard upon the assignments of error and petition for writ of error to the Supreme Court of the United

States, by Thomas Bailey, appellee herein, was submitted to the court; upon due consideration whereof, it is by the court ordered that a writ of error removing the record and proceedings in said suit to the Supreme Court of the United States be allowed, and that a citation be directed to Charles E. Yates and Louisa Hamer, administratrix of the estate of Ellis P. Hamer, deceased, appellants herein, for their appearance in said Supreme Court of the United States.

J. FAWCETT,
Acting Chief Justice.

* * * * *

211 In the Supreme Court of the United States, October Term,
1914.

File No. 24243.

No. 504.

THOMAS BAILEY, Plaintiff in Error,
vs.

CHARLES E. YATES and LOUISA HAMER, Administratrix of the
Estate of Ellis P. Hamer, Deceased, Defendants in Error.

Designation for Printing.

The plaintiff in error in the above-entitled case intends to rely on the assignments of error contained in the record, and requests the Clerk of the Supreme Court of the United States to print the following portions of the transcript of the record, which he thinks necessary for the consideration of such errors:

1. Transcript page 1: All of page.
2. Transcript page 6: amended petition, commencing with the words "afterwards, on the 16th day of March, A. D., 1899", and ending with the signatures of attorneys on page 16.
3. Transcript page 17: Exhibits A and B, commencing at top of page and ending with signature- of directors, near bottom of page 20.
4. Transcript page 22: answer of Yates and Hamer, commencing with the words "and now come the defendants", and ending with the signature- of attorneys on page 28.
- 212 5. Transcript page 29: reply of plaintiff, commencing with the words "and now comes the plaintiff", and ending with the signature- of attorneys on same page.
6. Transcript page 31: Stipulation, commencing at top of page and ending with signature- of attorneys on page 32.
7. Transcript page 37: request for special findings, commencing at top of page and ending with signature of attorney, near top of page 41, but omitting titles.
8. Transcript page 43: commencing at top of page and including first eight lines.

9. Transcript page 46: leave to amend by interlineation and special findings, commencing at top of page and ending with the signature "B. F. Good", near center of page 48.
10. Transcript page 59: motion to amend, commencing at top of page and ending with signature- of attorneys on page 61.
11. Transcript page 62: Yates' motion for new trial, commencing at top of page and ending with signature of attorney on page 69.
12. Trans. p. 70: Hamer's motion for new trial, commencing at top of page (omitting title), and ending with signature of attorney at bottom of page 77.
13. Transcript page 78: findings and judgment, commencing at top of page and ending on page 81, with the words "and serve bill of exceptions".
14. Transcript page 96: judgment of reversal, commencing at top of page and ending with signature "J. Fawcett, Acting Chief Justice".
15. Transcript page 97: opinions of Hamer and Letton, JJ., commencing at top of page and ending at bottom of page 111.
16. Transcript page 112: motion for rehearing, commencing with the words "the undersigned appellee", and ending with signature- of attorneys at top of page 121.
17. Transcript page 123: opinion of Sedgwick, J., commencing at top of page and ending at bottom of page 130.
18. Transcript page 131: order for oral argument, commencing with the words "it is by the court ordered", and ending at bottom of page.
19. Transcript page 134: order granting rehearing commencing at top of page and ending with signature "J. Fawcett, Acting Chief Justice", near top of page 135.
20. Transcript page 135: motion to vacate order for rehearing, commencing with the words "the appellants, Charles E. Yates", and ending with signature- of attorneys on page 139.
21. Transcript page 147: statement of Reese, C. J., commencing at top of page and ending with the sixth line from top of page 150, with the words "as above stated".
22. Transcript page 181: order setting aside rehearing, commencing with the words "Supreme Court of Nebraska", and ending with the words "in the performance of my public duties", on p. 187 including the statements of Sedgwick, Barnes and Rose, but omitting in all cases the title of the case.
23. Transcript page 188: motion for rehearing, commencing at top of page and ending at bottom of page 189.
24. Transcript page 191: order denying rehearing, commencing with the words "this cause coming on to be heard", and ending with the signature "J. Fawcett, Acting Chief Justice", near top of page 192.
25. Transcript page 193: petition for writ of error. All of page.
26. Transcript page 195: assignments of error, commencing at top of page and ending at bottom of page 198.
27. Transcript page 199: allowance of writ of error, commencing

at top of page, and ending with signature "J. Fawcett, Acting Chief Justice".

THOMAS BAILEY,
Pl'ff in Error,
By L. C. BURR &
J. J. THOMAS.

Rec'd copy of above designations this 21st day of Aug., 1914.

215 STATE OF NEBRASKA,
Seward County, ss:

J. J. Thomas being first duly sworn deposes and says that on the 21st day of August, 1914 he served a copy of the annexed designation for printing on the defendants in error, Charles E. Yates and Louisa P. Hamer, administratrix by leaving a true and correct copy thereof at the office of Bishop & Hall, a partnership composed of Frank M. Hall and Frank E. Bishop at the First National Bank Building in Lincoln, Nebraska, with their stenographer and employee.

Affiant avers that he was unable to make personal service upon either of the members of said firm for the reason that the said Hall was in the City of Chicago and the said Bishop somewhere in the Dominion of Canada.

J. J. THOMAS.

Subscribed in my presence and sworn to before me this 22d day of August, 1914.

[Notarial Seal S. C. Stoner, Seward County, Nebraska.]

S. C. STONER,
Notary Public.

Commission expires Oct. 8, 1918.

216 [Endorsed:] 504/24243. In the Supreme Court of the United States. Thomas Bailey, Pl'ff in Error, v. Charles E. Yates et al., Def'ts in Error. File No. 24243. Oct. Term, 1914. No. 504. Designation for printing. L. C. Burr & J. J. Thomas, Att'y for P'ff in Error.

217 [Endorsed:] File No. 24,243. Supreme Court U. S., October Term, 1914. Term No. 504. Thomas Bailey, Plaintiff in Error, vs. Charles E. Yates et al. Designation by plaintiff in error of parts of record to be printed, with proof of service of same. Filed August 25th, 1914.

Endorsed on cover: File No. 24,243. Nebraska Supreme Court. Term No. 504. Thomas Bailey, plaintiff in error, vs. Charles E. Yates and Louisa Hamer, administratrix of the estate of Ellis P. Hamer, deceased. Filed May 26th, 1914. File No. 24,243.

Office Supreme Court, U. S.

FILED

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JAMES D. MAHER

CLERK

IN THE

Supreme Court of the United States

October 1914 Term.

Number

163

JONES NATIONAL BANK, PLAINTIFF IN ERROR,

VS.

CHARLES E. YATES, DAVID E. THOMPSON, AND
LOUISA HAMER, ADMINISTRATRIX OF THE
ESTATE OF ELLIS P. HAMER, DECEASED,
DEFENDANTS IN ERROR.

Number

164

BANK OF STAPLEHURST, PLAINTIFF IN ERROR,

VS.

CHARLES E. YATES, DAVID E. THOMPSON, AND
LOUISA HAMER, ADMINISTRATRIX OF THE
ESTATE OF ELLIS P. HAMER, DECEASED,
DEFENDANTS IN ERROR.

Number

165

UTICA BANK, PLAINTIFF IN ERROR,

VS.

CHARLES E. YATES, ET AL., DEFENDANTS IN ERROR.

Number

166

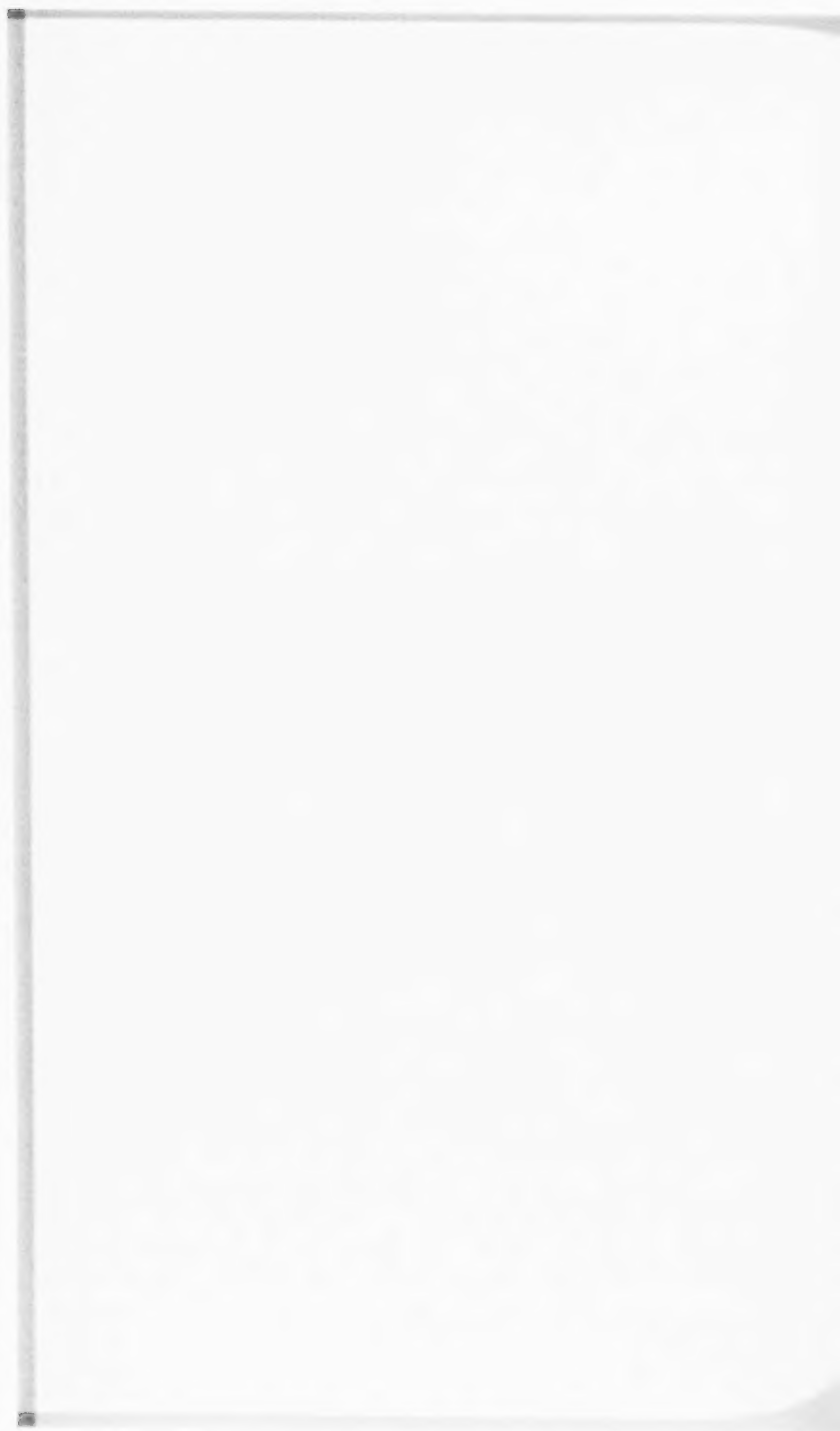
THOMAS BAILEY, PLAINTIFF IN ERROR,

VS.

CHARLES E. YATES, ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

MOTION OF DEFENDANTS IN ERROR TO ADVANCE.



IN THE
Supreme Court of the United States

October 1914 Term.

Number 501.

JONES NATIONAL BANK, PLAINTIFF IN ERROR,
VS.

CHARLES E. YATES, DAVID E. THOMPSON, AND
LOUISA HAMER, ADMINISTRATRIX OF THE
ESTATE OF ELLIS P. HAMER, DECEASED,
DEFENDANTS IN ERROR.

Number 502.

BANK OF STAPLEHURST, PLAINTIFF IN ERROR,
VS.

CHARLES E. YATES, DAVID E. THOMPSON, AND
LOUISA HAMER, ADMINISTRATRIX OF THE
ESTATE OF ELLIS P. HAMER, DECEASED,
DEFENDANTS IN ERROR.

Number 503.

UTICA BANK, PLAINTIFF IN ERROR,
VS.

CHARLES E. YATES, ET AL., DEFENDANTS IN ERROR.

Number 504.

THOMAS BAILEY, PLAINTIFF IN ERROR,
VS.

CHARLES E. YATES, ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEBRASKA.

MOTION OF DEFENDANTS IN ERROR TO ADVANCE.

The above named defendants in error, Charles E. Yates,
David E. Thompson and Louisa Hamer, administratrix of the

estate of Ellis P. Hamer, deceased, move the court to advance these cases for hearing, agreeably to rule 26, paragraph 4, for the reason that these cases were once adjudicated by this court upon the merits as appears by the records on file herein.

For a statement of the matters involved and of the particular reasons for this application, the defendants in error state:

The cases are here on several writs of error to the supreme court of the state of Nebraska to review a judgment which reversed several judgments of the district court of Seward county, Nebraska, in favor of the several plaintiffs in error and against the defendants in error, charging defendants in error with liability for deposits of the Capital National Bank of Lincoln, Nebraska, on the ground that they knowingly made or participated in the making and publication of false reports to the comptroller of the currency, of the resources and liabilities of said Capital National Bank.

The Nebraska supreme court, in its several judgments which the present writs of error seek to review, held that the evidence was not sufficient to establish that the defendants in error, or any one of them, knowingly made or knowingly participated in the false official reports complained of, and dismissed the defendants in error without day.

These cases were once heard and adjudicated by this court upon the merits, at the October 1906 term, the opinion by the present Mr. Chief Justice being reported under the title of *Yates v. Jones National Bank*, in 206 U. S. 158-181, decided May 13, 1907. This court in the decisions mentioned, adjudged erroneous and reversed the several judgments of the supreme court of Nebraska in the same identical suits affirming judgments of the district court of Seward county in said state, which imposed liability on these defendants for the deposits of said Capital National Bank, upon the ground that the said state court had denied to these defendants in error a right or immunity granted by section 5239 of the Revised Statutes of the United States.

The proceedings and several judgments, for review of which the present writs of error were sued out, were had under and in obedience to the several mandates of this court issued to carry into effect its prior decisions and judgments in these identical suits, rendered May 13, 1907.

Each of the records returned with and in obedience to the commands of the writs of error issued in these cases, now on file with the clerk of this court, shows upon its face that it is the identical suit once heard and determined on the merits in this court. There is in the record of each one of these cases a copy of a mandate issued therein by the supreme court of Nebraska to the district court of Seward county, Nebraska, stating and reciting that the judgment of said court had been reviewed on a writ of error by the supreme court of the United States. Said mandates in all these cases are alike in form, substance and purport, and vary only in respect to the docket numbers and names of the parties, so that a copy of one thereof truly exhibits the facts stated and recited in all of them. In *Bank of Staplehurst v. Charles E. Yates, et al.*, term No. 502, pages 37 and 38, appears a copy of the mandate mentioned, containing the following statements and recitals:

"That afterwards, upon a writ of error issued (sued) out by said Charles W. Mosher, Charles E. Yates, David E. Thompson, Louisa Hamer, administratrix of the estate of Ellis P. Hamer, deceased, and Richard C. Outcalt, said cause was appealed to the supreme court of the United States, wherein, during the October term, 1906, thereof, the said cause coming on to be heard before the supreme court of the United States, in consideration whereof it was ordered and adjudged by the said supreme court of the United States, that the said judgment of our supreme court in this cause be reversed with costs, and that the said Charles E. Yates, David E. Thompson and Louisa Hamer, administratrix of the estate of Ellis P. Hamer, deceased, recover against the said The Bank of Staplehurst the sum of \$584.75, for their costs therein expended, and that execution issue therefor; and it was also by the said supreme court of the United States ordered that the said cause in the said supreme court of the United States as to the said Charles W. Mosher and Richard C. Outcalt be dismissed for want of prosecution; and it was by the said

supreme court of the United States further ordered that said cause be, and the same duly was remanded to our supreme court for further proceedings not inconsistent with the opinion of said supreme court of the United States.

"That afterwards, and on the 4th day of May, 1908, said mandate from the supreme court of the United States was duly filed in this court."

In all of the trials and hearings heretofore had in these cases in the district and supreme courts of the state of Nebraska, and in this court upon writs of error, the causes have been tried or heard together, and in the appellate proceedings they have been heard upon a common bill of exceptions and ruled by one opinion. In the records now presented to this court for review on writs of error the same bill of exceptions is returned and filed in all of the cases, and the legal issues arising on the records are identical and common to all of them, and it is appropriate that they be argued together upon the present writs. The application to advance is, therefore, presented in all of the above entitled cases by a single motion.

FRANK M. HALL,

FRANK E. BISHOP,

*Counsel for Charles E.
Yates and Louisa
Hamer, Administra-
trix, etc., Defend-
ants in Error.*

JOHN F. STOUT,

HALLECK F. ROSE,

ARTHUR R. WELLS,

*Counsel for David E.
Thompson, Defend-
ant in Error.*

NOTICE OF MOTION TO ADVANCE.

To Messrs. J. J. Thomas, R. S. Norval, T. L. Norval and L. C. Burr, Counsel for Plaintiffs in Error:

You are hereby notified that the defendants in error shall submit to the supreme court of the United States, at a stated term thereof, on Monday, December 14th, 1914, at the capitol in the city of Washington in the District of Columbia, at the opening of the court on that day, or as soon thereafter as counsel can be heard, their motion to advance the above entitled case, a copy whereof is annexed hereto.

November 30, 1914.

FRANK M. HALL,

FRANK E. BISHOP,

*Counsel for Charles E.
Yates and Louisa
Hamer, Administra-
trix, etc., Defend-
ants in Error.*

JOHN F. STOUT,

HALLECK F. ROSE,

ARTHUR R. WELLS,

*Counsel for David E.
Thompson, Defend-
ant in Error.*

Service of above notice and of the motion to advance thereto annexed is hereby acknowledged this.....day of
....., 1914.

.....
Counsel for Plaintiffs in Error.



6

Office Supreme Court, U. S.
FILED
FEB 1 1915
JAMES D. MAHER
CLERK

BEFORE THE
SUPREME COURT OF THE UNITED STATES.

No. 501. 163

JONES NATIONAL BANK, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES ET AL.

No. 502. 164

BANK OF STAPLEHURST, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES ET AL.

No. 503. 165

UTICA BANK, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES ET AL.

No. 504. 166

THOMAS BAILEY, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES ET AL.

PETITION FOR REASSIGNMENT.

ARTHUR B. HAYES,
Counsel for Plaintiffs in Error,
Colorado Building, Washington, D. C.

FEBRUARY 1, 1915.



BEFORE THE
SUPREME COURT OF THE UNITED STATES.

No. 501.

JONES NATIONAL BANK, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES ET AL.

No. 502.

BANK OF STAPLEHURST, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES ET AL.

No. 503.

UTICA BANK, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES ET AL.

No. 504.

THOMAS BAILEY, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES ET AL.

PETITION FOR REASSIGNMENT.

Come now the above-named plaintiffs in error, by one of their counsel of record, Mr. Arthur B. Hayes, and move the court for a reassignment of the hearing or oral argument in the above-named cases, from Tuesday, the twenty-third

day of February, 1915, to Monday, the fifth day of April, 1915, for the following reasons, to wit:

That the advanced assignment of these cases before this court for February 23, 1915, was upon motion made on behalf of Charles E. Yates and others, defendants in error; that the records in these several cases are very voluminous, and that these records are still in the hands of the printer, and it is not known when the printing of said records will be completed.

That when said records are printed they must be transmitted to Seward, Nebraska, to the chief counsel for the plaintiffs in error, and that there is not sufficient time for said counsel to prepare his brief prior to the said twenty-third day of February, 1915, even should the rule of this court be waived requiring the services of plaintiffs' brief upon counsel for defendants three weeks before the time set for argument.

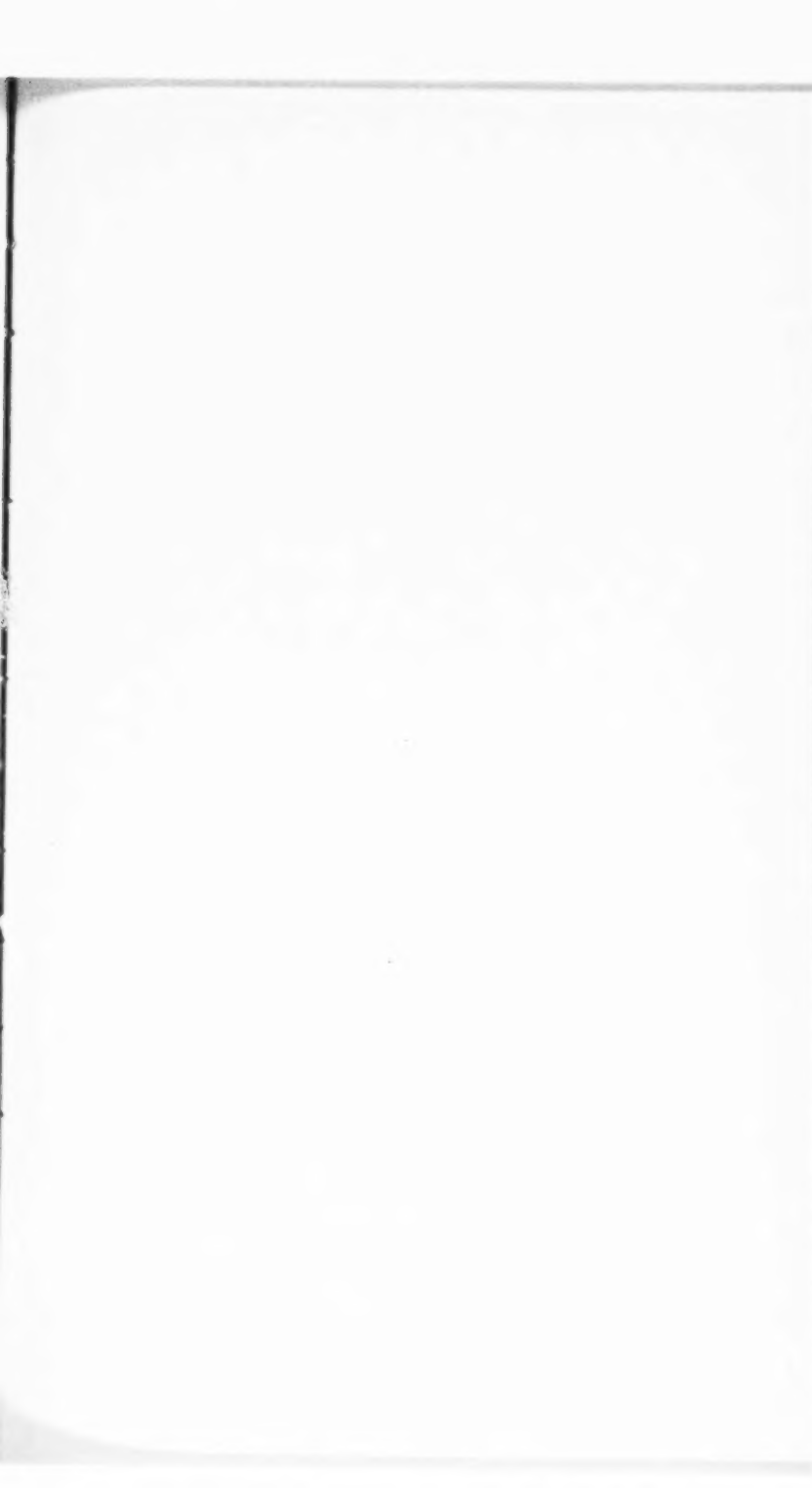
That notice of this motion has been served upon counsel of record for the said defendants in error.

And herein plaintiffs in error will ever pray this honorable court.

Respectfully submitted,

ARTHUR B. HAYES,
Counsel for Plaintiffs in Error,
Colorado Building, Washington, D. C.

FEBRUARY 1, 1915.





SU

JONES BATHING

PLAINTIFFS

CHARLES E. YATES

BANK OF OMAHA

PLAINTIFFS

CHARLES E. YATES

UTICA BANK

PLAINTIFFS

CHARLES E. YATES

THOMAS BAYLES

PLAINTIFFS

CHARLES E. YATES

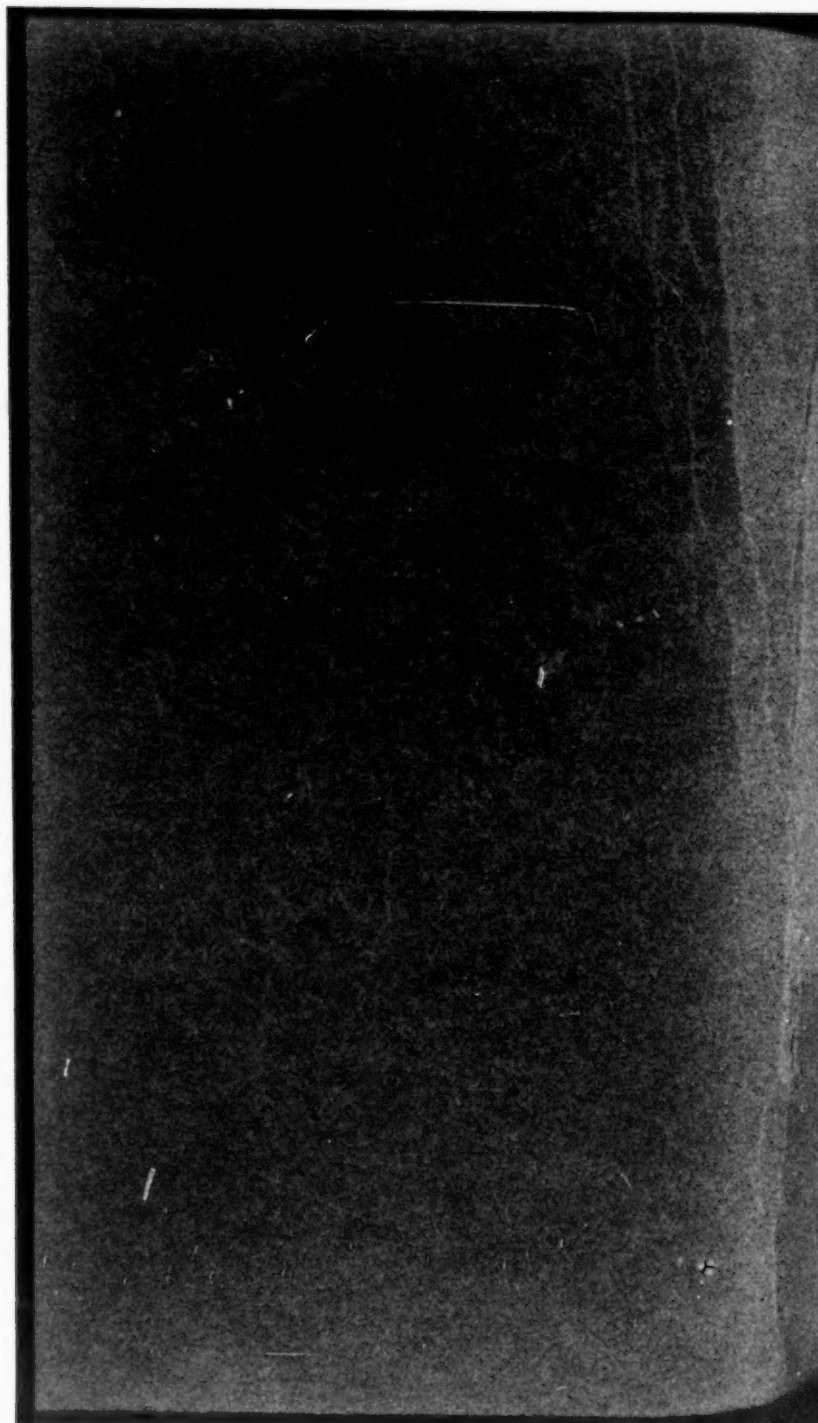
MEMORANDUM TO THE SUPREME COURT OF NEBRASKA

REPLY FOR PLAINTIFFS TO ANSWER

J. J. THOMAS and L. C. BOWEN

Attorneys for Plaintiffs in Error

WENBORN, 702 15th St., Omaha, Nebraska



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IN THE
SUPREME COURT
OF THE
UNITED STATES

October Term, 1914.

JONES NATIONAL BANK,
PLAINTIFF IN ERROR,

VS.

CHARLES E. YATES, D. E. THOMP-
SON, LOUISA HAMER, *Administra-
trix of Estate of Ellis P. Hamer,
Deceased*, DEFENDANTS IN ERROR.

October Term 1914 No. 501
General Number 24240

BANK OF STAPLEHURST,
PLAINTIFF IN ERROR,

VS.

CHARLES E. YATES, D. E. THOMP-
SON, LOUISA HAMER, *Administra-
trix of Estate of Ellis P. Hamer,
Deceased*, DEFENDANTS IN ERROR.

October Term 1914 No. 502
General Number 24241

UTICA BANK,
PLAINTIFF IN ERROR,

VS.

CHARLES E. YATES, D. E. THOMP-
SON, LOUISA HAMER, *Administra-
trix of Estate of Ellis P. Hamer,
Deceased*, DEFENDANTS IN ERROR.

October Term 1914 No. 503
General Number 24242

THOMAS BAILEY,
PLAINTIFF IN ERROR,

VS.

CHARLES E. YATES, D. E. THOMP-
SON, LOUISA HAMER, *Administra-
trix of Estate of Ellis P. Hamer,
Deceased*, DEFENDANTS IN ERROR.

October Term 1914 No. 504
General Number 24243

ERROR TO THE SUPREME COURT OF NEBRASKA.

BRIEF FOR PLAINTIFFS IN ERROR.

HISTORY OF CASES.

These cases come to this court by writ of error to the supreme court of the state of Nebraska. The four cases involve identically the same issues.*

They were tried together upon stipulation (Trans., p. 17) and were before this court in *Yates v. Jones National Bank*, 206 U. S. 158.

The defendant in error David E. Thompson, is a party only in the cases of Jones National Bank and the Bank of Staplehurst.

The actions were commenced in the district court of Seward county, Nebraska, February 25th, 1895. They were twice removed to the federal court and remanded, and were once before the circuit court of appeals (74 Fed. 15; 95 Fed. 223; 107 Fed. 561). They were first tried to a jury in the district court of Seward county, Nebraska, in May, 1902, which resulted in verdicts and judgments for the plaintiffs. Defendants prosecuted error to the supreme court of Nebraska and the judgments were affirmed (54 Nebr. 734). Thereupon the cases were reviewed in this court and reversed and remanded (206 U. S., 158).

Pursuant to the mandate of this court the cases were again tried in the district court of Seward county in February, 1911; the parties, by stipulation, waiving a jury and submitting the questions of fact and law to the court. The trial again resulted in judgments for the plaintiffs, whereupon defendants prosecuted error to the supreme court of Nebraska.

When the causes came on for submission Reese, C. J., believing he had been counseled some years previously by H. T. Jones, who was then the cashier of the Jones National Bank (but who was neither an officer or stockholder of that institu-

* Note.—Since the issues are alike in all cases, in referring to matters contained in the transcript, reference will be made to the case of Jones National Bank v. Yates et al., No. 501, October term, 1914.

Note.—Italics used throughout the brief are curs unless otherwise indicated.

tion at the time of the last trial [B. of Ex., p. 179]), did not take part in the decision, thus leaving but six judges to decide the case.

Hamer, J., wrote the opinion of the court reversing and dismissing the cases (Trans., p. 50), which was concurred in by Barnes and Rose, JJ.

Letton, J., concurred in part (Trans., p. 55), and Sedgwick and Fawcett, JJ., dissented (Trans., p. 61).

Plaintiffs filed motions for rehearing (Trans., p. 56). On consideration of these motions Letton, J., having been convinced that he was wrong (Trans., p. 93), voted with Sedgwick and Fawcett, JJ., in favor of a rehearing. Hamer, Barnes and Rose, JJ., voted against the rehearing. Reese, C. J., having in the meantime discovered he was in error in believing himself disqualified, voted in favor of the rehearing (Trans., p. 75), and his statement shows that he did not originally take part in the decision because he thought he had been consulted by one of the parties at the time of the failure of the Capital National Bank (January, 1893)—over twenty years previously—but afterwards discovered his error. Affidavits were filed on behalf of the plaintiffs in error (Trans., pp. 77 to 89, inclusive), showing conclusively that the chief justice had never been retained or counseled by any of the parties in any of the cases, nor by any one in their behalf. It should be observed also that the supposed disqualification did not exist except as to the case of the Jones National Bank, yet the non-participation applied to all—apparently for the reason that all the cases were briefed and argued together.

The chief justice's right to participate was challenged by judges opposed to granting the rehearing. Speaking of the situation, Reese, C. J., says: "Judges Barnes and Hamer, while protesting against my vote, did it in a gentlemanly and personally friendly way"—leaving it to be inferred that such was not the case with Judge Rose.

The defendants filed motions to set aside the order granting the rehearing for the reason that the chief justice was dis-

qualified from participating in said proceedings and that the order was therefore void and of no effect. Plaintiffs thereupon challenged the propriety of Judge Rose's further participation in the cases on account of bias and prejudice (Trans., p. 90), he being the brother of Halleck F. Rose, who has been the active attorney for defendant David E. Thompson throughout this litigation. The recusation was, however, disregarded, Rose, J., deeming himself qualified to sit.

The motions to set aside the former orders granting rehearing were sustained. Thereupon Sedgwick, J., moved as follows:

"Whereas it appears that there is not a constitutional majority of this court who think that the findings and judgment of the district court ought to be reversed, and this court has now full jurisdiction of these cases; I move that the former judgments of this court reversing and dismissing these cases be vacated and set aside, and the cases re-submitted for further consideration and final decision."

On this motion the court stood equally divided, Reese, C. J., not sitting, and the rehearing was considered denied (Trans., p. 92; see opinion of Sedgwick, Trans., p. 93).

We have thus the anomalous situation of a reversal not concurred in by a majority of the court when the cases were finally disposed of.

STATEMENT OF THE CASE.

The defendants were directors of the Capital National Bank of Lincoln, Nebraska. The Bank was organized in June, 1883, with a purported capital stock of \$100,000, under the name "Marsh National Bank." In May, 1884, the name was changed to "Capital National Bank," and the capital stock increased to \$200,000. It was at this time that the defendants became directors, and so continued until the failure of the bank, January 21st, 1893.

In July, 1886, the capital stock was increased to \$300,000, where it remained until its failure (B. of Ex., p. 185).

It is undisputably established by the evidence that the Bank was insolvent from the very day of its organization, and at the date of its failure its liabilities exceeded its assets more than a million dollars. These facts were not controverted in the state court.

While the Bank was a going concern the defendants published, pursuant to the call of the comptroller, statements of its financial condition which were published in accordance with the provisions of the national bank act. All of these statements represented the Bank to be in a solvent and flourishing condition, whereas it was at all times hopelessly insolvent. The books of the Bank were a mass of falsehoods. They grossly exaggerated the assets of the Bank and understated its liabilities—while the published reports disclosed a condition even more favorable than the books from which they purported to be taken.

The plaintiffs in error were depositors in the Capital National Bank, and had been for several years prior to its failure. After the Bank failed plaintiffs brought these actions against the defendants to recover damages for false and fraudulent representations made as to the financial condition of the Bank—statements made by the defendants as aforesaid while acting as its directors, and in reliance upon which plaintiffs lost their deposits.

The allegations of plaintiff's petition are referred to later in this brief. They contain all the allegations contained in the complaint in *Thomas v. Taylor*, 224 U. S., 73, which, it has been decided, states a cause of action under Sec. 5239, Rev. St. U. S.

In the early stages of this litigation plaintiffs, acting upon the authority of *Prescott v. Hughey*, 65 Fed. 653, and *Gerner v. Hoshier*, 58 Neb. 135, assumed that the remedy provided in Sec. 5239 *supra* was cumulative—not exclusive; and that for

a false representation contained in an official report of a national bank's condition, published pursuant to law, a depositor might sue to recover under the national bank act, or pursue his remedy at the common law for fraud and deceit. It was upon this theory these cases were first tried in the district court.

The state supreme court being committed to the rule that the common law action of deceit was available, the trial court instructed the jury accordingly, and when the cases reached the supreme court of the state on review that court, consistent with its former decisions, affirmed the judgments (*Yates v. Jones National Bank*, 74 Neb. 734). It was on account of the error of the trial court in omitting the element of *scienter* in its instructions to the jury that these cases were reversed by this court (*Yates v. Jones National Bank*, 206 U. S. 158).

We urged that the cases should be affirmed as based on "representations other than those contained in the official reports made by the association to the comptroller of the currency and published in conformity to the National Bank act," but this court examining the evidence, concluded that the so-called "official reports" * * * "were, if not exclusively, certainly principally, the grounds of the alleged false representation covered by the proof," and reversed the cases.

Upon the second trial—which is now before this court for review—the parties waived jury and the issues of both law and fact were submitted to the court, where judgment again went for plaintiffs. The record establishes that in September, 1891, and February, 1892, the comptroller sent warning letters to the associations' officers (to which reference is made later in this brief), and that some of the published reports complained of were made *prior* and some *subsequent* to that time. The findings of the trial court therefore deal with the nature and extent of the liability *before* and *after* the receipt of those letters; and, also, the liability for the publication

of *statements attested* by the directors and those which they permitted the officers to make and publish *without their attestation*.

The record establishes that the director, Yates, attested official reports both before and after the comptroller's letter; that those attested by Director Thompson were before and those attested by Director Hamer were after that time.

Director Hamer was not a witness in the cases, having died some years previous.

Directors Thompson and Yates testified they had nothing to do with the management of the Bank; had positively no knowledge as to the conditions of its affairs, and accordingly, contend that the reports made by them (which are admittedly untrue) were not made with knowledge of their falsity.

Plaintiffs contend: (1) That as to reports made prior to the receipt of the comptroller's letters defendants knew they had no actual knowledge concerning the matters therein stated (for if their testimony be true, knowledge was impossible), yet they gave out the reports as positive and unqualified statements of facts susceptible of knowledge, and which it was their duty to know; that even if they believed the statements to be true they were guilty of knowing misrepresentation in passing off their opinion or belief in the guise of positive knowledge; or of making the reports recklessly.

(2) That subsequent to the comptroller's letters it became the directors' imperative duty to at once enter upon the performance of their duties; that if they obeyed, they knew the Bank's condition; if not, they are charged with such knowledge as the performance of duty would have given; and thereafter are conclusively presumed to know the untruthfulness of the reports.

(3) That they knew these untrue reports were being published by the officers of the Bank and are therefore liable, whether they personally attested them or permitted and assented to their publication without such attestation.

(4) That the evidence sustains the finding that subsequent to the comptroller's letters the directors had actual knowledge of the Bank's condition and of the publication of untrue official reports.

In determining liability the trial court found, in response to request for special findings made by defendant Thompson, that the defendant (Trans., p. 27) "failed to perform his duties as a director * * * in failing to personally assist his fellow directors in managing and superintending the business of such bank, and to examine the loans and securities thereof, and to see that the general condition of the Bank correspond with its books, and to see that only good bills receivable were entered upon the Bank's books and its statements, and to see that the assets which were worthless or of little value were charged off," and that while said director "had no actual, personal knowledge of the truth or falsity of the reports made to the comptroller, attested by him," * * * yet "in attesting such reports" * * * "the defendant relied upon the statements made to him by the president and cashier of the Bank, and without any investigation, and that at the time of attesting such statements the defendant knew that he had no personal knowledge of the truth or falsity of such reports, and that the same were attested recklessly and without performing his duties, * * * and in this respect the court finds that the same were not made in good faith."

As to the official reports published *subsequent* to the comptroller's letters, the court, in response to defendants' requests for special findings, found that the attesting directors knew said reports "contained material false representations of the financial condition of said Bank, and were, in fact, false and untrue"; and as to the non-attesting directors, that they "had knowledge and knew" that official reports of the Bank's condition "were being published in the newspapers"; that they "had knowledge and knew said statements * * * contained material false representations of the financial condition of said Bank, and were, in fact, false and untrue, * * *

and with knowledge of all the matters and facts aforesaid they, and each of them, *knowingly* permitted, assented to and allowed the same to be made" and "published" by the officers of the Bank (Trans., pp. 44, 45, 46); that the reports represented the Bank to be sound, solvent and prosperous, when it was, in fact, at all times insolvent (Trans., p. 46); that its losses at all times greatly exceeded its capital stock; that it, in fact, never had any capital stock, undivided profits or surplus, and when it closed its doors its liabilities exceeded its assets by more than a million dollars (Trans., p. 45).

It is thus apparent that the trial court applied the rule of liability prescribed by Sec. 5239 *supra*, as construed by this court in *Yates et al. v. Jones National Bank*, 206 U. S. 158, and *Thomas v. Taylor*, 224 U. S. 73.

It is quite as apparent that the state supreme court misconceived the import of those decisions and decided these cases upon the theory that to incur liability directors must personally attest the report upon which such liability is predicated, and must have actual personal knowledge of the falsity of the statement.

In speaking of the first decision of the Nebraska supreme court in these cases, Mr. Justice White (now Mr. Chief Justice White) said:

"The doctrine, as we have seen, upon which the court below rested its judgment, was that directors of a national bank who merely negligently participated in and assented to the making and publishing of an untrue official report * * * were civilly liable to one deceived to his injury by such report. Indeed, in one respect, the ruling below went further than this, since it was, in substance, decided that, despite the exercise of diligence by the director, if he attested an untrue report he was civilly liable * * *"

and concluded that to entail liability "proof of something more than negligence is required; that is that the violation must 'in effect,' be intentional."

The state supreme court's error was perhaps largely due to its misunderstanding of the words "knowingly," and "in effect

intentional." It construed the former as necessarily implying the existence of *actual personal knowledge* and the latter as necessitating the existence of a willful intent to injure another—excluding the consideration of gross recklessness and deliberate violation of duty.

It is now made clear in the opinion of Mr. Justice McKenna (*Thomas v. Taylor, supra*) that "proof of something more than negligence" does not require "proof of something more than recklessness," and that "there is 'in effect' an intentional violation of a statute" where a director deliberately refuses to do his duty.

This error into which the state court fell is shown in the opinion of Hamer, J. He says (Trans., p. 52):

"A knowledge must be brought home to the director that he is deceiving the individual wronged and may thereby occasion a loss to him. The director is not liable * * * for the frauds and wrongs of the officers of the bank unless he has *personal knowledge* thereof, or *participates* in such fraudulent acts." * * * (Trans., p. 55). "The plaintiffs having failed to allege and prove that the defendants *personally knew of, or personally participated in*, the acts of the officers of the bank of which they now complain, it seems clear that, if we follow the decision of the supreme court of the United States in these cases, they are not entitled to recover." (93 Neb. 126-130.)

To disclose its utter failure to grasp the issues or apply the correct measure of responsibility, we quote further from the opinion:

"These cases were taken on error to the supreme court of the United States where our judgments were reversed * * * where it was held that plaintiff's petitions were insufficient to charge the defendants with a common law liability for fraud and deceit" (Trans., p. p. 50).

That

"Plaintiffs amended their petition by interlineation and thereby sought to change the cause of action so as to avoid the federal question," but that defendants "contend * * * that the amendments above mentioned were wholly insufficient to change the plaintiff's cause of

action; that they still charge a violation of the national banking act"; and that the "interlineations * * * consisted of some slight amplification of the statements contained in the original petition," but "contained no material additional statements of fact and the petition charged the defendants with making false statements to the controller of the currency as to the condition of the Capital National Bank, and this is the main foundation or basis for recovery."

"By the amendment plaintiff attempts to charge that the defendants knowingly and fraudulently, and with intent to deceive the plaintiff, made such statements, and that they thereby induced the plaintiffs to become depositors in the Capital National Bank. * * * Each of the defendants demurred. The demurrers were overruled. * * * It is probable the demurrers should have been sustained." (For what reason we are not advised) (Trans., p. 50).

The opinion concludes that branch of the discussion with the statement:

"It is sufficient to say that we are of the opinion that the amendments in no way changed the nature of the plaintiff's causes of action; and, unless the supreme court of the United States shall recede from its decision of these cases, the petitions will be held insufficient by that court to state a common law liability for fraud and deceit."

Coming then to a discussion of the nature of the liability established by Sec. 5239, *supra*, the opinion continues (p. 126):

"A knowledge must be brought home to the director that he is deceiving the individual wronged and may thereby occasion a loss to him. The director is not liable for his own mistakes or blunders, or for the mistakes or blunders of his brother directors; neither is he liable for the frauds and wrongs of the officers of the bank unless he has *personal knowledge* thereof, or participates in such fraudulent acts * * * (Trans., p. 52). It may be said with much plausibility and reason that it should be the duty of the directors to look into the condition of the bank of which they are directors but that matter seems to have been determined by the supreme court of the United States in the case of *Briggs v. Spaulding*" (Trans., p. 53).

And concludes that,

"The plaintiffs having failed to *allege* and *prove* that the defendants *personally know* of or *personally participated* in the acts of the officers of the bank of which they now complain, it seems clear that if we follow the decision of the supreme court of the United States in these cases they are not entitled to recover" (Trans., p. 55).

Speaking of the liability of the defendant Thompson (Trans., p. 126), the opinion says:

"While it may be said that for a *considerable length of time before the bank was closed by the comptroller he had some knowledge that its financial condition was questioned*, still, so far as the record shows, defendant Thompson did not *personally participate* in any of the acts of which the plaintiffs complain" (Trans., p. 52).

The concurring opinion of Letton, J. (Trans., p. 55), shows he also misconceived the decision of this court. While the cases were pending upon rehearing he realized his error and endeavored to rectify it, but without avail—although without his concurrence there could have been no reversal.

One familiar with this record can not but sympathize with the lamentations of Sedgewick, J., in his dissenting opinion (93 Neb. 132):

"It seems to me wonderful that any member of this court should so completely misunderstand the opinion of that (United States supreme) court" (Trans., p. 62).

ASSIGNMENTS OF ERROR.

The assignments of error are twenty-five in number. The plaintiffs in error, however, respectfully request the court that if errors "not assigned or specified" are essential to a reversal of the judgment that the court, under Sec. 4, rule 21, will act upon such omitted or non-assigned errors.

The Assignments to be Considered Are as Follows:

1. The supreme court of the state of Nebraska erred in rendering the judgment in favor of appellants and in dismissing said action.

2. The court erred in deciding that the petition of appellee did not state facts sufficient to constitute a cause of action in favor of appellee and against appellants, or either of them.

3. The court erred in deciding that "where, by the federal statutes concerning national banks, a responsibility is made to arise against the directors from its violation knowingly proof of something more than negligence is required, and it must be shown that the violation was intentional." The correct and proper construction of said statute being "not therefore that as a condition of liability there should be proof of something more than recklessness,—not that there should be an intentional violation, but a violation 'in effect' intentional. There is 'in effect' an intentional violation of a statute when one deliberately refuses to examine that which it is his duty to examine."

4. The court erred in that it has violated and disobeyed the mandate and decision of the United States supreme court in this case, in that, whereas by the mandate and decision of that court this case was reversed and remanded for further proceedings not inconsistent with the decision and opinion of said United States supreme court, the proceedings, decision, opinions and judgment in this case in this court are in direct conflict and inconsistent with the opinion and decision of the United States supreme court, and in violation and disobedience of its mandate; that this court has placed a construction and interpretation upon section 5239 Revised Statutes of the United States in conflict with and opposition to the decision of the United States supreme court in this case, and as a result thereof appellee has been denied a right especially set up and claimed under sections 5211 and 5239, Revised Statutes of the United States.

5. The court erred in deciding that in order to sustain an action against appellants for making and publishing false statements of the financial condition of the bank in their reports made and published pursuant to the order and com-

mand of the comptroller of the currency, it was necessary that such false statements should be made with "personal knowledge of their falsity."

6. The court erred in deciding that in order to bring appellants within the rule of liability announced by the supreme court of the United States in this case, it was necessary that such defendants should have had personal knowledge of the falsity of their reports.

7. The court erred in finding and deciding that the evidence in the record is not sufficient to sustain appellee's judgment against appellants, and each of them, under sections 5211 and 5239, Revised Statutes of the United States.

8. The court erred in finding and deciding that the evidence in the record is insufficient to charge appellants with having knowingly made and published false statements of the financial condition of the Capital National Bank, or with knowingly permitting the officers, agents or servants of said Bank to make and publish such false statements, or with participating in or consenting thereto.

9. The court erred in deciding that the provisions of section 5239, Revised Statutes of the United States, are exclusive of the common law action for fraud and deceit as to false statements and representations of the financial condition of a national bank, made voluntarily and wholly outside of the requirements of the National Banking act, and not pursuant to the call of the comptroller of the currency or other proper official.

10. The court erred in deciding that appellee's petition is insufficient to state a cause of action at the common law for fraud and deceit, or that the decision of the United States supreme court in this case so decided.

11. The court erred in deciding that the evidence in the record is insufficient to sustain appellee's judgment against appellants, and each of them, because its decision is based upon an erroneous interpretation and construction of section

5239, Revised Statutes of the United States, and the decision of the United States supreme court in this case, in that it has assumed that in order to sustain recovery it must appear that appellant directors had personal knowledge of the falsity of their statements; "that knowledge must be brought home to the director that he is deceiving the individual wronged, and may thereby occasion a loss to him," or that the director must personally participate in the act complained of.

By reason of said erroneous decision appellee has been denied a right specially set up and claimed under said section 5239, Revised Statutes of the United States.

12. The court erred in not deciding that after receiving the letters from the comptroller of the currency, shown by the record, it was the duty of appellant directors to enter upon some reasonable examination and investigation of the affairs and financial condition of the bank; and that their deliberate refusal or failure to so do constituted "in effect" an intentional violation of section 5239, Revised Statutes United States, and if, without so doing, they thereafter make false statements of its financial condition, or permit any of its officers, agents or servants to make the same, or if they assent thereto, they become liable in their individual capacity under section 5239, Revised Statutes of the United States, to depositors of the bank for all damages sustained in consequence of such violation, even if they did not know the statement to be false.

13. The court erred in not deciding that where a director of a national bank, through his own recklessness or deliberate disregard of duty, is wholly ignorant of the affairs and financial condition of the bank, and conscious of his ignorance, makes or attests a statement of its financial condition, without knowing whether it be true or false, and it is actually false and untrue, he is guilty of a false representation, knowingly made, and liable under section 5239, Revised Statutes of the United States.

14. The court erred in deciding that appellants, Yates and Hamer, did not knowingly violate any of the provisions of section 5239, Revised Statutes of the United States, although they each attested published reports of the financial condition of the Capital National Bank which were admittedly false and untrue, after receiving the letters from the comptroller of the currency, shown in the record.

15. The court erred in deciding that the appellants, and each of them, did not knowingly violate any of the provisions of section 5239, Revised Statutes of the United States, although they each permitted the officers, agents and servants of the Capital National Bank to make and publish false statements of its financial condition, and assented to and acquiesced in the same, after receiving the letters from the comptroller of the currency, shown in the record.

16. The court erred in not deciding that where a director of a national banking association, who had paid no attention to its affairs and is ignorant of its financial condition, makes or attests a statement of such condition, in which he represents a material fact to be true to his personal knowledge, as distinguished from belief or opinion, when he does not know whether it is true or false, and it is actually untrue, he is guilty of a falsehood, knowingly made, even if he believed it to be true. That after receiving the letters from the comptroller of the currency, shown by the record, it was his duty to enter upon the discharge of his duty and acquaint himself with the affairs of the association, and that his failure to do so is gross negligence and recklessness, or a deliberate refusal to perform such duty, and constitutes an intentional violation of section 5239, Revised Statutes of the United States.

And if thereafter he makes or attests statements of its financial condition or permits its officers, agents or servants to do so, and such statements are in fact false and untrue, he is liable under section 5239, Revised Statutes of the United States, in his personal and individual capacity for all damages

which a depositor may have suffered in consequence of such false representation, regardless of whether or not said director had actual personal knowledge of its falsity.

17. The court erred in not deciding that under the findings of fact of the trial court in this case appellee's judgment should have been affirmed.

18. The court erred in not deciding that the findings of fact of the trial court contain every element necessary to sustain appellee's judgment, under section 5239, Revised Statutes of the United States, and as such are supported by the evidence.

19. The court erred in deciding that in order to incur liability under section 5239, Revised Statutes of the United States, for the making or attesting of a false statement of the financial condition of a national banking association, it is necessary that the one making or attesting such statement should have actual personal knowledge of the falsity thereof.

20. The court erred in not deciding that by their attestation of the official published report shown by the record the appellant directors affirmed and represented they had actual knowledge of the financial condition of the bank and of the truthfulness of said statement, and if they made the same recklessly, without knowledge of its truth or falsity, or conscious that they had no knowledge of its truthfulness, they are guilty of a false representation in effect knowingly made and liable under section 5239, Revised Statutes of the United States.

21. The court erred in deciding that the allegations of appellee's petition are insufficient to sustain the judgment against appellants under section 5239, Revised Statutes of the United States.

22. The judgment of reversal and dismissal is erroneous because the opinion of Hamer, J., as to the findings of fact is not concurred in by a constitutional majority of all the elected and qualified judges of this court—Letton, J., having

only concurred on the law—and therefore the findings of fact of the trial court have not been reversed or modified, but stand approved and affirmed by this court.

23. The court erred in reversing appellee's judgment and dismissing the case because the judgment is not concurred in and supported by a majority of the duly elected and qualified judges of this court, as provided in article VI, section 2 of the constitution of the state of Nebraska—whereby appellee has been deprived of his property without due process of law and denied the equal protection of the laws, all of which is prohibited by and in conflict with the fourteenth amendment to the Constitution of the United States.

This court still had jurisdiction of this case at the time it came on for final determination on appellee's motion for a rehearing, and when the final order was made herein there was not a majority of the court who were in favor of or concurred in the reversal and dismissal of this case.

24. The court erred in not deciding that appellee's petition states a cause of action against appellants, whether tested by the requirements of the National Banking act or the common law action for fraud and deceit, and in assuming that the United States supreme court decided appellee's petition did not state facts sufficient to constitute a cause of action at the common law for fraud or deceit.

25. Your petitioner further shows that in the rendition of said judgment by said court—

There was drawn in question the validity of an authority exercised under the United States, and the decision of said court was against its validity.

There was drawn in question the construction and application of the statutes of the United States, and the decision of said court was against the right, title and privileges especially set up in said suit and claimed by appellee under said statutes.

Some of the assignments of error cover points included in part in others, and we believe we can present the issues more methodically and logically by departing from the order and manner of their assignment.

STATEMENT OF POINTS RAISED IN BRIEF.

Thus considered, our contentions may be stated as follows:

(1) Plaintiff's petitions state a cause of action whether tested by Sec. 5239, Rev. Stat. U. S., or the common law.

Thomas v. Taylor, 224 U. S. 73.

Davis v. Central Land Co. (Ia.), 143 N. W. 1073.

(2) The provisions of Sec. 5239, Rev. Stat. U. S., requiring a "knowing" violation in order to subject a director to the liability therein imposed do not demand proof of an "intentional" violation, but a violation "in effect" intentional. And there is "in effect" an intentional violation of the statute when a director deliberately fails or refuses to examine that which it is his duty to examine.

Thomas v. Taylor, 224 U. S. 73.

(3) While bank directors may delegate the performance of ministerial duties to subordinate officers, agents or servants under their supervision and direction, they may not abdicate their trust as directors by committing the management of the affairs of the association to others, and thus avoid responsibility and liability. It is their duty to actually, actively and diligently manage its affairs, and from this obligation they cannot absolve themselves; and they will be held to such knowledge as the performance of that duty would give—or conversely, they will not be absolved from liability on account of ignorance which could only result from gross negligence, wilful recklessness or deliberate refusal to perform their duty.

Bank v. Drake, 29 Kans. 236.

Hall v. Henderson, 126 Ala. 495, 28 So. 544.

Society v. Underwood, 9 Bush 609.

Rankin v. Cooper, 149 Fed. 1010.

Warren v. Robison, 19 Utah 289, 57 Pac. 287, 75 Am. St. 734.

Auten v. U. S. National Bank, 174 U. S. 147, 19 Sup. Ct. 637.

McClure v. People, 27 Colo. 371, 61 Pac. 617.

Henry v. Dennis (Maine), 85 Am. St. 388-399, note.

Solomon v. Bates, 118 N. C. 311, 54 Am. St. 725.

Houston v. Thornton, 122 N. C. 365, 65 Am. St. 699.

Marshall v. F. & M. Savings Bank, 85 Va. 676, 17 Am. St. 84, note, p. 100.

Fletcher v. Eagle (Ark.), 109 Am. St. 100.

Martin v. Webb, 110 U. S. 7, 7 Sup. Ct. 428.

Bank v. Caperton, 87 Ky. 306, 88 S. W. 885.

Williams v. McKay, 40 N. J. Eq. 190, 11 Am. & Eng. Corp. cases 613.

Delano v. Case, 121 Ill. 247, 12 N. E. 676.

Scale v. Baker, 70 Tex. 283, 7 S. W. 742.

Hum v. Cary, 82 N. Y. 71.

Huntington v. Attrill, 118 N. Y. 365.

Utley v. Hill, 155 Mo. 632, 49 L. R. A. 323, 78 Am. St. 569.

Briggs v. Spaulding, 141 U. S. 132.

Gerner v. Mosher, 58 Neb. 135.

(4) That by the act of "attesting" as "correct" an official report of the financial condition of a national bank directors thereby affirm and represent that they have actual knowledge of the bank's condition and of the truthfulness of the report, as distinguished from mere opinion or belief, and

(a) If they make or "attest" untrue statements without knowledge of whether they are true or false, they are guilty of false representation in effect knowingly made.

(b) If they make or attest such statement recklessly without knowledge of its truth or falsity, or conscious that they have no actual knowledge of its truthfulness, they are guilty of a false representation "knowingly" made.

(c) So, where directors, who through gross neglect of duty or reckless inattention have not participated in the management of the bank's affairs, and are ignorant of its financial condition, make a representation of such condition, and they do not know whether it be true or false, and it is actually untrue, they are guilty of a false representation, knowingly made.

Boyd v. Schneider, 131 Fed. 223.

Vincent v. Corbett, 94 Miss. 46, 21 L. R. A. (N. S.) 85, 20 Cyc. 24-29.

Cooper v. Schlesinger, 111 U. S. 148, 4 Sup. Ct. 360.

Lehigh Zinc & Iron Co. v. Bamford, 150 U. S. 665, 14 Sup. Ct. 219.

Hindman v. First National Bank, 112 Fed. 924.

Taylor v. Commercial Bank, 68 App. Div. (N. Y.) 460.

Haddock v. Osmer, 153 N. Y. 604, 47 N. E. 923.

Rothschild v. Mack, 115 N. Y. 7, 21 N. E. 726.

Cole v. Cassidy, 138 Mass. 437, 52 Am. Rep. 284.

Chatham Furnace Co. v. Moffat, 147 Mass. 403, 18 N. E. 168.

Gund Brewing Co. v. Peterson, 130 Ia. 301, 106 N. W. 741.

Thomas v. Taylor, 224 U. S. 73.

Joiner v. Combs (Okla.), 132 Pac. 1115.

Arrowsmith v. Nelson (Wash.), 132 Pac. 743.

Grant v. Ledwidge (Ark.), 160 S. W. 200.

Plate v. Blades (N. C.), 79 S. E. 608.

Davis v Central Land Co. (Ia.), 143 N. W. 1073.

Gerner v. Mosher, 58 Neb. 135.

Morse on Banks and Banking, Secs. 132-3.

(5) That after receiving the letters from the comptroller of the currency, shown by the record, it was the directors' duty to enter upon the exercise of their functions and acquaint themselves with the affairs of the association, and their failure to do so was gross negligence and recklessness, or a deliberate refusal to perform their duty and constituted

an intentional violation, actionable under Sec. 5239, Rev. Stat. U. S.

(a) And if, thereafter, directors make or attest statements of the associations' financial condition, or permit its officers, agents or servants to do so, and such statements are in fact false and untrue, they are liable in their personal and individual capacity for all damages which a depositor may have suffered in consequence of such false representation, regardless of whether or not the directors had actual personal knowledge of the falsity.

(b) That upon receipt of the letters aforesaid it was the duty of the directors to acquaint themselves with the affairs of the association, and they are presumed to have such knowledge of its condition as a performance of their duty would have given them.

Thomas v. Taylor, 224 U. S. 73.

Chesbrough v. Woodworth, 195 Fed. 875.

C., St. L. & P. R. Co. v. Nash, 1 Ind. App. 298, 27 N. E. 564.

(6) It follows that the state court erred in deciding that to entail liability under section 5239 for the publication of false official reports of the bank's condition, it must be shown that the director had actual knowledge of its falsity—that knowledge must be brought home to the director that he is deceiving the individual wronged, and may thereby occasion a loss to him—or that they personally participated in the act complained of.

(7) The state court, in testing the sufficiency of the evidence to sustain recovery, having weighed it under an erroneous interpretation of section 5239, *supra*, and a misconception of the decision of this court in these cases, it follows its conclusions in that regard are erroneous. Measured by the correct rule of responsibility, the evidence establishes un-

doubted liability, and the finding and judgment of the trial court should be affirmed.

Yates v. Jones National Bank, 93 Neb. 137.

Black v. Epstein, 221 Mo. 286.

Stuart v. Hayden, 169 U. S. 1, 18 Sup. Ct. 274.

F. & M. National Bank v. Mosher, 68 Neb. 724.

(8) The judgments of the supreme court of Nebraska were not concurred in by a majority of the duly elected and qualified judges of said court, as required in article VI, section 2, of the constitution of Nebraska—wherefore plaintiffs in error have been deprived of their property without due process of law and denied the equal protection of the law in violation of the fourteenth amendment to the Constitution of the United States.

ARGUMENT.

POINT I.

The Petitions State a Cause of Action Whether Tested by Sec. 5239, *supra*, or the Common Law.

It would seem needless to discuss this proposition. A mere reading of the petitions will suffice. We refer the court to the complaint in the case of *Thomas v. Taylor*, 224 U. S. 73. A comparison of that complaint with the petitions in these cases will disclose that the latter contain every element necessary to state a cause of action, whether tested by the federal statute or the common law.

See also *Davis v. Central Land Co.* (Ia.), 143 N. W. 1073.

The statement in the majority opinion that our petitions do not charge *scienter* can only be accounted for on the assumption that they were not carefully examined.

POINT II.

The Provisions of Sec. 5239, Rev. Stat. U. S., Requiring a Knowing Violation in Order to Subject the Director to the Liability Therein Imposed, do Not Demand Proof of an Intentional Violation But a Violation "in Effect" Intentional. And There is, "in Effect," an Intentional Violation of the Statute Where a Director Deliberately Fails or Refuses to Examine That Which it is His Duty to Examine.

In support of this proposition it is unnecessary to do more than quote briefly from the opinion of Mr. Justice McKenna in *Thomas v. Taylor, supra*, a case identical in its facts with the ones at bar:

"Let us consider the argument of plaintiffs in error. It is that the statement was not voluntary, having been made under the command of the national banking act, and therefore an element of the action of deceit is wanting; and that such act requires 'proof of something more than mere negligence and recklessness; nothing short of an intentional violation will suffice.' *Yates v. Jones Nat. Bank* and other cases are cited to support the contention. The contention goes beyond what was said in *Yates v. Jones Nat. Bank*. The language there is 'that where by law a responsibility is made to arise from the violation of a statute knowingly, proof of something more than negligence is required,—that is, that the violation must in effect be intentional.' Not, therefore, that as a condition of liability there should be proof of something more than recklessness,—not that there should be an intentional violation,—but a violation 'in effect' intentional. There is 'in effect' an intentional violation of a statute when one deliberately refuses to examine that which it is his duty to examine. And such was the conduct of plaintiffs in error in this case. They had notice from the comptroller of the currency that \$194,000 of the items counted as assets of the bank were doubtful and should be collected or charged off. This 'was a direct warning to them,' as the trial court said, 'by the bank examiner and comptroller, that assets to nearly twice the amount of the capital stock were considered doubtful.' They, notwithstanding, represented the assets to be good. Such disregard of the direction of the officers appointed by the law to examine the affairs of the bank is a violation of the law. Their directions must be observed. Their function and author-

ity cannot be preserved otherwise and be exercised to save the banks from disaster and the public who deal with them and support them from deception."

POINT III.

While Bank Directors May Delegate the Performanec of Ministerial Duties to Subordinate Officers, Agents or Servants Under Their Direction, They May Not Abdicate Their Trust as Directors by Committing the Management of the Affairs of the Association to Others and Thus Avoid Responsibility and Liability. It is Their Duty to Actually, Actively and Diligently Manage Its Affairs, and From This Obligation They Cannot Absolve Themselves, and They Will be Held to Such Knowledge as the Performance of That Duty Would Give—or Conversely, They Will Not be Absolved From Liability on Account of Ignorance Which Could Only Result From Gross Negligence, Wilful Recklessness or Deliberate Refusal to Perform Their Duty.

It is the duty of directors to actively and actually manage the affairs of the bank. Directors of a bank are its only visible representatives. It is through them alone it manifests its existence. Persons dealing with the bank meet only this visible representative, and have a right to presume they are doing their duty.

Bank v. Drake, 29 Kans. 236. Opinion by Justice Brewer.

"Bank directors are not mere agents, like cashiers, tellers, and clerks. They are trustees for the stockholders; and as to their dealings with the bank they not only act for it, and in its name, but, in a qualified sense, are the bank itself. It is the duty of a board to exercise a general supervision over the affairs of the bank, and to direct and control the action of its subordinate officers in all important transactions. The community have the right to assume that the directory does its duty, and to hold them personally liable for neglecting it. Their contract is not alone with the bank. They invite the public to deal with the corporation, and when anyone accepts their invitation he has the right to expect reasonable diligence and good faith at their hands; and, if they fail

in either, they violate a duty they owe not only to the stockholders, but to the creditors and patrons of the corporation."

Hall v. Henderson, 126 Ala. 495, 28 So. 544. Quoting with approval from *Society v. Underwood*, 9 Bush, 609.

We invite special attention to *Rankin v. Cooper*, 149 Fed. 1010. It was an action against directors of a bank by stockholders and not by depositors. Speaking of the duties of directors, it declares, in substance, that while they are not expected to watch the daily routine of every days business, they should have a general knowledge of the manner in which the business is conducted, upon what securities its larger lines of credit are given, generally know of and give direction to its important and general affairs, and cause to be made frequent examinations of its resources and liabilities.

Warren v. Robison, 19 Utah 289, 57 Pac. 287, 75 Am. St. 734, was an action by stockholders against directors of a bank—agents of their own selection—for an accounting and damages occasioned by reason of negligence in the management of the bank. The opinion by Bartch, C. J., contains an exhaustive review of the authorities. It is an able discussion of the propositions for which we contend. We can present no better argument than to quote from the opinion (75 Am. St. 737-8) :

"It is not contended that the directors knowingly permitted any violation of law in any banking transaction, or that they were dishonest in the administration of the bank's affairs, but it is insisted that they wrongfully intrusted the exclusive management and control of the banking business to the cashier and manager, and were negligent in the performance of the duties imposed upon them by law. The directors were not intended to be mere figureheads without duty or responsibility. The manifest design of the law-makers was that the officers, elected by the board, were to look after and attend to the details of business, and generally to conduct ordinary business matters. They are the means with which the directors are to administer the affairs of the bank. It is, therefore, the right and duty of the directors to take upon themselves the management of the institution, and to exercise and

maintain a supervision over all business operations upon the skillful and wise conduct of which depend the prosperity of the institution and the safety of those dealing with it. This duty of management and supervision they cannot shift upon the officers, and such duty is imposed as to no department of the banking business more certainly than that of making loans and discounts. *Morse on Banks and Banking*, sec. 117.

(p. 739) "While such directors are not required to watch the ordinary routine of business or observe the exact state of each day's accounts, still they are bound to possess a general knowledge of the manner in which the business is transacted, and of the character of the transactions, and to maintain such a degree of vigilance over, and intimacy with, the business as will enable them to know to whom, and upon what security, the large lines of credit are given. Especially is this so as to large loans and discounts, or matters at once affecting the stability and prosperity of the bank, and the safety of depositors.

"The duties of officers appointed by the board are of an executive character and relate mainly to details, and doubtless the making of a loan or discount in any considerable amount, or the transaction of other business of moment, should be preceded by an authorization from the board. The duties of directors are administrative, relate to supervision and direction, and when it is sought to hold them responsible for a dereliction of duty, because of which a loss occurred to stockholders and creditors, they cannot evade liability by pleading ignorance of the affairs of the institution, incompetency, or gratuitous service, or that the management of the banking business was in the hands of the cashier or other executive officer.

(p. 740) "'Where there is a duty of finding out and knowing, *negligent ignorance has the same effect in law as actual knowledge*. While the directors of a corporation may and must, as already stated, commit the details of its business to inferior officers, this does not absolve them from the duty of maintaining a reasonable supervision, and if such inferior officers waste the assets of the corporation, it is conceded that the directors can not escape liability on the ground that they did not know of the wrongdoing, provided that it appear that their ignorance was the result of a want of that care which ordinarily prudent and diligent men would exercise under similar circumstances.' *Thompson on Corporations*, sec. 4108. And their liability does not depend upon statute. 'The liability of directors to the corporation for damages

caused by unauthorized acts rests upon the common-law rule which renders every agent liable who violates his authority to the damage of his principal. A statutory prohibition is material under these circumstances merely as indicating an express restriction placed upon the powers delegated to the directors when the corporation was formed' (citing authorities). * * *

(p. 741) "By taking such positions, although without compensation, directors invite confidence that they possess at least ordinary knowledge and skill, and that they will do all that men of reasonable prudence and caution ought to do to protect the interests of stockholders and depositors, or those dealing with the institution. The public, therefore, have a right to suppose that they are men of high character for integrity, of reasonably sound judgment, and of such good business sense as is necessary to conduct the affairs of the bank wisely and with reasonable safety. Acting upon this supposition, the public trust their deposits with the bank in the confidence that the important duty of management and direction will be discharged by the directors. * * * (p. 742) Under this rule it is necessary for them to give the business under their care such attention as an ordinarily discreet business man would give to his own concerns under similar circumstances, and it is therefore incumbent upon them to devote so much of their time to their trust as is necessary to familiarize them with the business of the institution, and to supervise and direct its operations. * * *

(p. 744) "So, in *Williams v. McKay*, 40 N. J. Eq. 189, 53 Am. Rep. 775, where the observations of Lord Chancellor Hardwicke and Hatherley were referred to with approval, Mr. Chief Justice Beasley, delivering the opinion of the court, said: 'I entirely repudiate the notion that this board of managers could leave the entire affairs of this bank to certain committeemen, and then, when disaster to the innocent and helpless *crestuis que trustent* ensued, stifle all complaints of their neglects by saying, We did not do these things, and we know nothing about them.' And again he said: 'The misconduct in question was manifested in frequent, glaring instances, and it is not easy to imagine how they, or some of them, failed to be discovered by these board of managers on the supposition which, in their favor the law will make, that they exercised their office in this respect with a reasonable degree of vigilance. The neglectful acts in question *can not be regarded by the court as isolated instances*, for

they run through the whole period of the life of this institution, and thus crinice a systematic and habitual disregard of the directions of the company's charter, and a very striking indifference with regard to the security of the money held in trust by them. * * *

"So in 3 *Thompson on Corporations*, section 4108, with reference to the *liability of directors for negligent ignorance of corporate affairs*, it is said: 'The true theory disregards the subtle and impracticable distinction between ordinary negligence and inattention and gross negligence and inattention, and holds directors responsible for not knowing that of which they had the means of knowledge; and while relieving them from the responsibilities of insurers, ascribes liability on the ground of ignorance of that which could have been discovered by that good business diligence which is incumbent upon them.' (Citing a large number of authorities in support of this proposition.) * * * (p. 752) Some of the directors, as is indicated by their statements on the witness stand, seem to have acted upon the theory that by the *appointment of executive officers* in whom they had confidence and who were reputed honest, they *discharged their duties as directors*; that the burdens and responsibility of management and supervision were then shifted to such officers. As we have seen, *such is not the law*. The directors were *not mere ornaments* to the bank to *lure public confidence*. When they became directors, the law cast upon them the important duties of supervision and direction, which they *could not delegate to the executive officers*, and therefore the stockholders and depositors had the right to intrust the institution with their money in confidence that the directors would perform these duties. When sued for losses which resulted from careless or unlawful acts, and unfortunate transactions, they *can never set up as a defense* that they *did not examine the books or accounts of the bank, knew nothing about the loans or discounts, were ignorant of banking business, or that they intrusted the management and supervision of the business to the executive officers in whom they had confidence*. The welfare of the public and the interests of banking institutions alike forbid this."

This language could be no more apt had it been intended to apply to the conduct of the directors in the cases at bar.

The Duties of Directors Considered in Connection With the Presumption as to Their Knowledge of the Bank's Affairs, and the Right of Depositors to Rely Thereon.

The duties of directors are to supervise and direct the affairs of the bank. That they can leave this to the executive officers, and then, when disaster follows, avoid liability on the ground of ignorance, is a notion which must be repudiated.

"Where there is a duty of finding out and knowing, negligent ignorance has the same effect, in law, as actual ignorance."

Warren v. Robison, supra.

"This court said by Mr. Justice Harlan, in *Martin v. Webb*, 110 U. S., at page 15, 3 Sup. Ct. 433: 'Directors can not, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of those officers. They have something more to do than from time to time to *elect the officers of the bank and to make declaration of dividends*. That which they ought, by proper diligence, to have known as to the general course of business in the bank, they *may be presumed to have known* in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business.'"

Auten v. U. S. National Bank, 174 U. S. 147, 19 Sup. Ct. 637.

The record in these cases proves that the defendant directors did nothing but to elect the officers of the bank and declare dividends.

In *McClure v. People*, 27 Colo. 371, 61 Pac. 617, plaintiff in error was convicted of statutory larceny in that, as president of a bank, he assented to the reception of deposits, knowing at the time that the bank was insolvent. The statute provided, in substance, that if the president of any bank should receive or assent to the reception of any deposit of money in such bank after he shall have had knowledge of the fact that such bank is insolvent, he shall be deemed guilty of larceny. The defendant "offered to show that he

did not reside in the town in which the bank was doing business, gave little or no attention to it, that the actual management and control were in the hands of others, and that he did not possess any actual knowledge whatever as to its condition; * * * that he was an illiterate man, possessing no knowledge of banking or bookkeeping, and that he was totally unable to determine from the books of the bank its condition, even if he had made an examination with that purpose in view; that he was unacquainted with the people of the town of Rico and with the value of the securities held by the bank." Campbell, C. J., who wrote the opinion of the court, said:

"The question then is, may a banker or officer of a bank exempt himself from criminal liability under the statute by intentionally absenting himself from the bank and abstaining from participating in its management and purposely neglecting to avail himself of means of information as to its financial condition, or by showing that if he had given attention to its business his lack of fitness or unfamiliarity with banking methods would not enable him to ascertain its true condition. The mere statement of the proposition, it seems to us, is its own refutation."

(Syl. par.) "An officer of a bank can not relieve himself from criminal liability for receiving deposits when the bank was insolvent by intentionally absenting himself from the bank and abstaining from participating in its management and purposely neglecting to avail himself of means of information as to its financial condition, or by showing if he had given his attention to its business *by reason of his lack of fitness and ignorance of banking methods*, he could not have ascertained its true condition."

In *Hall v. Henderson*, 126 Ala. 495, 28 So. 544, the court said:

"The doctrine is stated by *Thompson on Corporations*, (Sec. 5308) to be: 'It is a sound view, at least insofar as the question respects the rights of third parties, that the directors of a corporation are in law *conclusively presumed* to know its condition, its business, its receipts and expenditures and all the general facts which go to make up that condition and business, as shown by the entries on its regular books. *The reason of this is that it is their duty to know these things in the exercise of their official functions.* This doctrine is said to be one founded in

public policy, essential to the safety of third parties in their dealings with corporations, and to the protection of stockholders interested in the welfare and safe management of corporations.' Justice Brewer, now of the supreme court of the United States, while a member of the supreme court of Kansas, in the case of *Bank v. Drake*, 29 Kan. 326, said: *'The directory, as has been said, is the visible representation of the bank. Persons dealing with it meet only this visible representation and have a right to presume that it knows all of the affairs of the bank, all that the bank as a principal ought to know of its conditions and business.* On the other hand, the stockholders and depositors—the persons who are pecuniarily interested in the safe management and prosperity of the bank—look to the directors as the chosen guardians of their interests, and have a right to demand of them that they watch over all those interests in their minute details. So that all of these parties have a right to assume that the directors know all the transactions, business and conditions of the bank, because they ought to know them and because otherwise they do not discharge their full duties to these various parties.'"

Quoting with approval from *Society v. Underwood*, 9 Bush. 609, the court further said:

"It is the duty of bank directors to use ordinary diligence to acquaint themselves with the business of the bank, and whatever information might be acquired by ordinary attention to their duties they may, in controversies with persons transacting business with the bank, be presumed to have. *They cannot be heard to say that they were not apprised of facts shown to exist by the ledgers, books, accounts, correspondence, reconcilements and statements of the bank, and which would have come to their knowledge except for their GROSS NEGLIGENCE OR INATTENTION.* It is not necessary in many cases to show directly that the directors actually had their attention called to the mismanagement of the affairs of the bank, or the misconduct of the subordinate officers. It is sufficient to show that the evidence of the mismanagement or misconduct were such that it must have been brought to their knowledge unless they were GROSSLY NEGLIGENT OR WILFULLY CARELESS IN THE DISCHARGE OF THEIR DUTIES."

In note to *Henry v. Dennis* (Maine), 85 Am. St. 388-389, it is said:

"Before making representations as to the condition of the corporation, as inducements to take stock therein or

extend credit thereto, it is the duty of the officers to use reasonable diligence to know that the representations are true, and they will be *presumed to have used such diligence and to possess the knowledge which its exercise would bring them.* * * * If false and fraudulent statements are put forth, under the authority of the directors, it is not necessary that they should know them to be such; it is their duty to know them to be true and they are liable for damages sustained by anyone dealing with the corporation relying on the truth of such reports. *Solomon v. Bates*, 118 N. C. 311, 54 Am. St. 725; *Houston v. Thornton*, 122 N. C. 365, 65 Am. St. 699."

Rankin v. Cooper, 149 Fed. 1010, seems to us squarely in point, and reviews the leading cases on the question. In substance, it states the rule to be that while directors are not expected to watch the daily routine of every day's business, they should have a general knowledge of the manner in which the business is conducted, upon what securities its larger line of credits is given, generally know of and give direction to its important and general affairs, and cause to be made frequent examinations of its resources and liabilities. They must exercise reasonable control and supervision over the bank's affairs and use such care and diligence in ascertaining its affairs and conditions as an ordinarily prudent and diligent man would do with his own affairs. That if they knew or by the *exercise of ordinary care should know*, any facts which should awaken suspicion and put a prudent man on his guard, then a degree of care commensurate with the danger to be avoided is required, and a failure to exercise such care makes them responsible. "*Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them*" (p. 1013).

"And the mere fact that a director does not attend to his duties by reason of continued ill health or other business engagements does not necessarily relieve him from liability. (p. 1016) * * * He has no right to hold on to the position and at the same time decline its corresponding liabilities. By doing so, he invites others to trust the bank on the strength of his name and in such case he ought to bear his share of the consequences growing out of such a dual situation."

In this case the directors were held to have been negligent in the conduct of the bank's affairs. One of the defendants claimed to be an invalid and unable to give the bank's affairs proper attention, although it appeared he attended forty-six meetings in 1890, thirty-eight in 1891, and forty-eight in 1892, while the directors of the Capital National Bank held *fifteen regular and two special meetings* during the nearly *nine years of its existence*, of which Directors *Thompson and Hamer attended nine each and Director Yates fourteen*. It was also held that where directors became aware, through the report of a committee of their own number, or by a *letter from the comptroller*, that the Bank had been making excessive loans, but took no effective steps to prevent loss, they would be held jointly and severally liable for all losses sustained by the Bank which might have been prevented by a proper discharge of their duties, upon the principle that their attention having been called to the matter *they could not thereafter plead ignorance*.

(Syl. 2) "Ignorance on the part of directors of a bank of any fact which it is their duty to know can never be set up by them in defense or exculpation for any act which the existence of that fact should have prohibited."

(Syl. 3) "Directors of a bank owe a duty to its depositors and in the security of possible breaches of this duty the rigid rules which govern trustees have been applied. To exculpate a director, it is not sufficient that no actual dishonest action be shown or that he cannot be proved to have been influenced by interested motives."

(Syl. 6) "Bank directors are liable to the depositors for losses resulting from the fact that such directors did not attend to the business of the bank, absented themselves from regular meetings of the board of directors, and through their inattention permitted officers of the bank to withdraw money or property without authority, and other persons to largely overdraw their accounts, and notes to be rendered uncollectible from want of proper security, and from not being properly protested or enforced by appropriate proceedings. *The fact that any particular director did not know of these wrongdoings*

will not exonerate him because he could not be without such knowledge except from his own negligence."

Marshall v. F. M. Savings Bank, 85 Va. 676, 17 Am. St. 84; note, p. 100.

See also *Fletcher v. Eagle*, 74 Ark. 585, 109 Am. St. 100.

In *Martin v. Webb*, 110 U. S. 7, 3 Sup. Ct. 428, this court said:

"Directors cannot, in justice to those who deal with the bank, *shut their eyes* to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than from time to time to elect the officers of the bank and to make declarations of dividends. That which they ought, by *proper diligence*, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

In *Marshall v. F. & M. Savings Bank of Alexandria*, 85 Va. 676, 17 Am. St. 85, previously referred to, it was held that directors hold to stockholders, depositors and creditors the relation of trustees to *cestui que trustent*, and as such are personally responsible for fraud and loans resulting from negligence and inattention to their duties, even though they be not guilty of bad faith and are ignorant of the affairs of the bank.

To the same effect are:

Bank v. Caperton, 87 Ky. 306, 88 S. W. 885;

Williams v. McKay, 40 N. J. Eq. 190, 11 Am. & Eng. Corp. Cases 613;

Delano v. Case, 121 Ill. 247, 12 N. E. 676;

Scale v. Baker, 70 Texas 283, 7 S. W. 742.

In *Hun v. Cary*, 82 N. Y. 71, suit was brought by the receiver of a savings bank against directors to recover damages because of misconduct in the management of the affairs of the bank. Earl, J., speaking of the duties which directors owe the bank and its depositors, said:

"Few persons would be willing to deposit money in savings banks or to take stock in corporations, with the understanding that the trustees or directors were bound only to exercise slight care, such as inattentive persons would give to their own business, in the management of the large and important interests committed to their hands. When one deposits money in a savings bank or takes stock in a corporation, thus divesting himself of the immediate control of his property, he expects, and has a right to expect, that the trustees or directors, who are chosen to take his place in the management and control of the property, will *exercise ordinary* care and prudence in the trusts committed to them; the same degree of care and prudence that men, prompted by self interest, generally exercise in their own affairs. When one voluntarily takes the position of trustee or director of a corporation, good faith, exact justice and public policy unite in requiring of him such degree of care and prudence, and it is a *gross breach of duty—crassa negligentia*—not to bestow them."

"It seems that officers assuming the responsibility and charged with the duties of the management of the business of a corporation are chargeable with knowledge as to matters which are open to observation and legitimately subject to their inspection and control. * * * The officers assuming the responsibility and charged with the duties of management of the business of a corporation, are not supposed to *shut their eyes* to that which is open to observation and legitimately subject to their inspection and control."

Huntington v. Attrill, 118 N. Y. 365.

And in the case of *Utley v. Hill*, 155 Mo. 232, 49 L. R. A. 323, 78 Am. St. 569, cited in the decision in these cases (206 U. S., p. 158) the court, after reviewing numerous decisions, said:

"Of course, it must not be understood that it is intended to be held that a director can shut his eyes to facts, circumstances and conditions, and then say he did not know what he must have seen if he had used his senses; for such conduct would be fraudulent and wilful disregard of duty."

To require proof of actual personal knowledge is to confer complete immunity upon directors; for knowledge, like intent, is rarely susceptible of positive proof. The rule deducible from the decisions is to charge directors with knowl-

edge of the things it is their duty to know and of which they could not be ignorant but for gross negligence, recklessness or deliberate refusal to act. Otherwise, they can escape all responsibility and liability by purposely refraining from participation in the management of the association.

The case of *Briggs v. Spaulding*, 141 U. S. 132, cited in the opinion of Hamer, J., in these cases (93 Neb. 128) does not sustain his conclusion, and is clearly distinguished by Norval, J., in *Germer v. Mosher*, 58 Neb. 135-153, wherein it is said:

"That the result probably would have been different in *Briggs v. Spaulding*, *supra*, if that suit had been grounded as the present one, or had been brought by a creditor to recover loss occasioned by his having been induced to make deposits in the bank through false statements as to its financial condition made to the comptroller, is clearly inferable from the following excerpt from the majority opinion prepared by Chief Justice Fuller: 'The theory of this appeal is that the defendants are liable, not to stockholders nor to creditors as such, but to the bank, for losses alleged to have occurred during their period of office, because of their inattention. If particular stockholders or creditors have a cause of action against the defendants in fact, it is not sought to be proceeded on here, and the disposition of the questions arising thereon would depend upon different considerations. * * * Treated as a cause of action in favor of the corporation, a liability of this kind should not be lightly imposed in the absence of any element of positive misfeasance and solely upon the ground of passive negligence; and it must be made to appear that the losses for which defendants are required to respond were the natural and necessary consequence of omission on their part.'

"A bare majority of the court concurred in the decision in *Briggs v. Spaulding*, *supra*, four of the justices having dissented therefrom. The able dissenting opinion of Justice Harlan filed therein, in which Justices Gray, Brewer and Brown concurred, held that the directors of a national bank could not abdicate their duties and functions, and leave the administration and managements of its affairs solely to the executive officers, but that the law requires of directors 'such diligence and supervision as the situation and the nature of the business requires. Their duty is to watch over and guard the interests committed to them. In fidelity to their oaths, and to the ob-

ligations they assume, they must do all that reasonable, prudent and careful men ought to do for the protection of the interest of others intrusted to their charge."

But even in this case it was said in the majority opinion by Mr. Chief Justice Fuller (141 U. S. 132, 165; 11 Sup. Ct. 924, 935) :

"Without reviewing the various decisions on the subject, we hold that directors must exercise ordinary care and prudence in the administration of the affairs of a bank, and that this includes something more than *officialing as mere figure-heads*. They are entitled under the law to commit the banking business, as defined, to their duly authorized officers, but this *does not absolve them from the duty of reasonable supervision*, nor ought they to be permitted to be *shielded from liability because of want of knowledge of wrong-doing, if that ignorance is the result of gross inattention*."

POINT IV.

By the Act of Attesting as Correct an Official Report of the Financial Condition of a National Bank, the Directors Thereby Affirm and Represent That They Have Actual Knowledge of the Bank's Condition and of the Truthfulness of the Report, as Distinguished From Mere Opinion or Belief.

(A) If They Make or Attest Untrue Statements, Without Knowledge Whether They Are True or False, They Are Guilty of a False Representation, in Effect, Knowingly Made.

..(B) If They Make or Attest Such Statements Recklessly, Without Knowledge of Their Truth or Falsity, or Conscious That They Have no Actual Knowledge of Their Truthfulness, They Are Guilty of a False Representation, Knowingly Made.

(C) So Where Directors, Through Gross Neglect of Duty, Reckless Inattention, or Deliberate Refusal, Have Not Participated in the Management of the Bank's Affairs, and Are Therefore Ignorant of Its Financial Condition, Make a Representation of Such Condition and They do Not Know Whether it be True or False, and it is Actually Untrue, They are Guilty of a False Representation Knowingly Made, Although They Believed it to be True.

Sec. 5211, Rev. Stat. U. S., requires the association to make to the comptroller not less than five true reports each year

of its resources and liabilities, which shall be attested by the signatures of at least three of the directors, and published in a newspaper in the place where such association is established.

The publication can have but one purpose, and that to give notice to the world of its financial condition. It is designed for the protection of those who do business with the Bank. Depositors have no other source of information, and can look for guidance alone to the published reports.

When depositors entrust their money to the Bank it is with the implied agreement, inherent in the contract of deposit, that the directors will do their duty and conform to the safeguards provided by law.

Boyd v. Schneider, 131 Fed. 223.

The law makes it the duty of directors to diligently and honestly manage the affairs of the association and they are presumed to have such knowledge of its affairs as the performance of that duty will give them.

When they "attest" a report as "correct," as was done in these cases, it is equivalent to saying, "we have performed our duties as directors; we know the condition of the affairs of the association entrusted to our care; and we present you a true statement of its resources and liabilities for your information and guidance."

To "attest" means to certify as accurate, genuine and true; to vouch for or certify to (New Standard Dictionary, Webster's International Dictionary).

To "attest" as "correct" is a positive assertion that the report is true within the knowledge of the director, and not a mere certificate of confidence in the employee who made it.

It is a representation that he who makes the statement knows whereof he speaks, and, coupled with the circumstance that it comes from the only one in position to know, it must be accepted as an assertion of actual knowledge, and not mere opinion and belief.

Gerner v. Mosher, 58 Neb. 135.

"To bring a case within the principle above stated (requiring proof of scienter), it is not necessary that the party who has made the false statement of fact shall have unqualifiedly declared himself possessed of knowledge, or, in other words, that he shall have asserted in express terms that he knew his statement to be the truth. If a person makes a positive and unqualified false statement of a fact which is susceptible of knowledge, an affirmation of knowledge is implied from the positive character of the statement; and, if he has no knowledge, he is guilty of actual fraud."

Vincent v. Corbett, 94 Miss. 46, 21 L. R. A. (N. S.), 85-87, quoting from 14 Am. & Eng. Enc. Law, 2d Ed., p. 99.

"It is well settled that to support an action of deceit based on a false representation a scienter must be proved; that is, the representation must either (1) be false to the knowledge of the party who makes it, or (2) must be made as a positive assertion calculated to convey the impression that he has actual knowledge of its truth when in fact he is conscious that he has no such knowledge. It is generally held too that if the speaker honestly believes his representation to be true he is not liable, an honest mistake or error in judgment being regarded as insufficient grounds on which to base a charge of fraud. But the speaker's belief will not in all cases protect him from liability in an action for deceit, as where he makes the statement recklessly.

"It is not always necessary that the speaker should actually know that his representation is false. If the statement is of a matter susceptible of accurate knowledge and he makes it recklessly, without any knowledge of its truth or falsity, and in the form of a positive assertion calculated to convey the impression that he knows it to be true, the representation is equally fraudulent. The rule just stated applies, although the speaker honestly believes that the fact which he represents as existing actually does exist. In such a case it is apparent that he cannot believe in the truth of the statement he makes—that he knows the fact to exist—and the fraud consists in *passing off his opinion or belief in the guise of positive knowledge*. Consequently the speaker is not relieved from liability, although in making the assertion he relies upon trustworthy information."

20 *Cyc.*, pp. 24-29.

"This rule is not an exception to, but an application of, the principle that actual fraud must be shown to sustain an action of deceit; and is not in conflict with the rule requiring a scienter."

20 *Cyc.* 29, note, and cases cited.

Davis et al. v. Central Land Co. et al. (Ia.), 143 N. W. 1073, is one identical in principle with the cases at bar, and contains an able review of the authorities on the question of *scienter*.

The action was one in deceit against the agents of a vendor of real estate for false representation, in stating that the lot purchased by plaintiffs extended to the alley, when it lacked 35 feet or more of doing so.

Speaking of the situation, the court said:

"The size was a matter of definite knowledge and readily ascertainable as distinguished from mere matter of opinion and judgment which might vary, and the assertion that it extended to the alley, if made, carried with it the implied assurance that Trent (a defendant) knew this to be a fact. If the Davises (plaintiffs) are to be believed, he was asked if the lot extended back to the alley and the reason for wanting to know explained, and Trent in answering must have intended to give them to understand that he knew the boundary and that it was as stated. He was showing the lot for the purpose of selling it to them and in so doing they quite naturally would assume that he knew its location. The jury then might have found that Trent did not know whether the premises extended to the alley or not, and yet *asserted as of his own knowledge* that they abutted thereon, and, if so, and plaintiffs were induced thereby to enter into the contract of purchase to their damage, a verdict must have been returned for the plaintiff."

The rule deducible from the opinion upon the authorities cited is:

(1) That the charge of fraudulent intent in actions for deceit is sustained if the misrepresentation is made with knowledge of its falsity or couched in such positive and unqualified terms as to amount to an affirmation of knowledge of the truth.

(2) If such statement is made in such absolute or positive terms as implies knowledge, and the party making it has

no knowledge of its truth, he has knowingly told what is untrue in putting his statement in such form as to amount to an assertion of knowledge when he in fact has none.

(3) If such representation is made as aforesaid of a matter susceptible of actual knowledge, as distinguished from matter of opinion, estimate or judgment, the fraud consists in stating that he knows the thing to exist, when he does not know it, and in such case a belief in its existence will not warrant or excuse a statement of actual knowledge, and it is not necessary to make proof of actual intent to deceive.

(4) Where, from the party's special situation or means of knowledge, it becomes his duty to know, the rule requiring proof of *scienter* is satisfied by showing that the situation of the defendant was such as to possess him with special means of knowledge as to the truth or falsity of his assertions.

(5) Positive assertion of knowledge is not required. If a man makes an untrue representation of a material fact as of his own knowledge, not knowing whether it is true or false, such statement, unqualified amounts to an affirmation as of one's own knowledge—and the falsehood is intentional. The law will impute a fraudulent purpose. In the language of Judge Cooley: "The fraud here consists in the reckless assertion that it is true of which the party knows nothing and in deceiving the other party thereby."

"A statement recklessly made, without knowledge of its truth, is a false statement knowingly made, within the settled rule."

Cooper v. Schlesinger, 111 U. S. 148, 4 Sup. Ct. 360.

In the foregoing case the court approved the following instruction:

"It is not necessary, to constitute a fraud, that a man who makes a false statement should know precisely that it is false. It is enough if it be false, and if he made it recklessly, and without an honest belief in its truth, or without reasonable ground for believing it to be true, and be made deliberately and in such a way as to give the person to whom it is made reasonable ground for supposing that it was meant to be acted upon and has been acted upon by him accordingly."

In *Lehigh Zinc & Iron Co. v. Bamford*, 150 U. S. 665, 14 Sup. Ct. 219, Mr. Justice Harlan, delivering the opinion of the court, said:

"The court said, in substance, that a person who makes representations of material facts, assuming or intending to convey the impression that he has actual knowledge of the existence of such facts, when he is conscious that he has no such knowledge, is as much responsible for the injurious consequences of such representations, to one who believes and acts upon them, as if he had actual knowledge of their falsity; that deceit may also be predicated of a vendor or lessor who makes material untrue representations in respect to his own business or property, for the purpose of their being acted upon, and which are in fact relied upon, by the purchaser or lessee, *the truth of which representations the vendor or lessor is bound, and must be presumed, to know.* * * *; but where the representations are material, and are made by the vendor or lessor for the purpose of their being acted upon, and they relate to matters which he is *bound to know, or is presumed to know, his actual knowledge of their being untrue is not essential.*"

Hindman v. First Natl. Bank, 112 Fed. 934, was a common law action of deceit against the bank for false representation as to the condition of the Columbia Fire Insurance Company, made by the cashier, by reason of which complainant was led to buy shares of the insurance company's stock. The circuit court of appeals sustained the right to the action, and held:

"To sustain an action for fraud and deceit, based on false representations by defendant, by which plaintiff was induced to purchase property, it must be shown (1) that the representation was false, and (2) that the person making it knew it to be false; *but if the fact was one within his means of knowledge, and he had no knowledge of it, the jury is authorized to find that the statement was knowingly made.* * * * If the fact be one within his means of knowledge and he have no knowledge of the fact, the jury would be authorized to believe that the statement was knowingly false."

The opinion was by Lurton, J., and a writ of error in the case was denied by this court April 28th, 1902 (186 U. S. 483).

"At all events, according to plaintiff's testimony, he made a material representation assuming to have knowledge of the facts, and therefore the liability is precisely the same as if made with knowledge of its falsity."

Taylor v. Commercial Bank, 68 App. Div. (N. Y.) 460.

"An action to recover 'damages for deceit' can not be maintained without proof of fraud, as well as injury, but the fraud may consist in the *affirmation of positive knowledge of that which one does not positively know*; and where a party represents a material fact to be true to his personal knowledge, as distinguished from belief or opinion, when he does not know whether it is true or not, and it is actually untrue, he is guilty of falsehood, *even if he believes it to be true.*"

Haddock v. Osmer, 153 N. Y. 604, 47 N. E. 923.

In the foregoing case, Vann, J., quotes with approval from the opinion of Judge Peckham in *Rothschild v. Mack*, 115 N. Y. 7, 21 N. E. 726:

"He either knew or he did not know of the financial condition of the makers of the note. If he did know it, then he knew that the note, as to both makers and endorsers, was without value. If he did not know its condition, he yet *assumed to have actual knowledge* of the truth of his statement. * * * He certainly meant to convey the impression of actual knowledge of the truth of the representations he made as to the value of the note, and he either knew such representations were false, or else he was conscious that he had no actual knowledge while assuming to have it, and intending to convey such impression. If damages ensue, this makes an actionable fraudulent representation."

"Directors are liable for injuries to a person who relies upon a statement issued by them, which they did not know to be true, as well as when they knew it to be false.

"What the directors ought to have known by a proper diligence as to the general course of the bank's business, they are presumed to have known in any contest between the bank and third parties dealing with it in good faith.

"Where the cashier of a bank, acting within the scope of his authority, and for the purpose of enabling the bank to collect or secure a debt owing to it, makes false representations concerning the financial responsibility of a debtor to a person from whom such debtor is endeavor-

ing to purchase goods upon credit, with knowledge that such representations are false, or assuming to have positive knowledge of the facts, when as a matter of fact he has not such knowledge, and thereby induces the party to whom the representations are made to sell the goods to the debtor upon credit, the bank is liable for the wrongful act of such cashier, although it was done without its authority or knowledge and resulted in no profit to it."

Morse on Banks and Banking, Sections 132-133.

To the same effect see:

Cole v. Cassidy, 138 Mass. 437, 52 Am. Rep. 284.

Chatham Furnace Co. v. Moffat, 147 Mass. 403, 18 N. E. 168.

"Where one falsely asserts a material fact to be true as of his own knowledge and injury and damage result therefrom, he is not thereafter permitted to assert that he had no knowledge on the subject."

Gund Brewing Co. v. Peterson, 130 Ia. 301, 106 N. W. 741.

The following recent cases support our contention:

Joiner v. Combs, (Okl.) 132 Pac. 1115.

Arrowsmith v. Nelson, (Wash.) 132 Pac. 743.

Grant v. Ledwidge, (Ark.) 160 S. W. 200.

Plate v. Blades, (N. C.) 79 S. E. 608.

And many other cases might be cited.

But it is unnecessary to multiply cases, for the same principle has been approved by this court in *Thomas v. Taylor*, 224 U. S. 73, a case on all fours with the ones at bar.

THOMAS V. TAYLOR, SUPRA.

We trust we may be pardoned a review of the proceedings in that case, as it seems to us decisive of the issues involved herein.

The records of this court (*Thomas v. Taylor*, No. 21928, October term, 1911, No. 171) show that liability was not grounded on proof of actual knowledge.

The findings of fact upon which judgment was based were, in substance, as follows:

(1) That the published statement on which liability was predicated was true as shown by the books (while in the cases at bar they were untrue even in this respect) (Trans., p. 10, par. 9).

(2) That the defendants fully believed the published statement to be true (Trans., p. 13, par. 32).

(3) That the statements were not signed "correct, attested," with the intention of deceiving the public or anyone who might deal with the Bank (Trans., pp. 13-14).

(4) "That at the time the defendants attested the said report to be correct, they knew or had reason to believe that it was not correct, and they either knew that the statement was untrue or they *wilfully refused to make an examination and attested the report recklessly.*" (Trans., p. 21, par. 14.)

There was no proof of actual knowledge—the only evidence on this point being the stipulation of the parties that the defendants had knowledge of the comptroller's letter calling attention "to the situation of the bank" (Trans., pp. 42-43), and the court, in the published opinion, says "what actual facts they knew concerning the condition of the Bank is not disclosed by the evidence." In fact, it was strenuously urged by plaintiff in error in this court (brief, point VII, p. 64; point XII, p. 76), that there was no proof of actual intentional fraud; and that the findings did not support the judgment (point VI, p. 59, and see pp. 50 to 58).

Discussing the question of *scienter* Justice Van Kirk says, (106 N. Y. S. 538) (Trans., p. 49) :

"The defendants urge that, though the report should be found false, there is not sufficient proof that the defendants knew it to be false, and that they cannot be held liable in an action for deceit based upon the false report, unless they attested the report knowing it to be false.
* * * Had they examined as they *should have done*, they would have learned that the capital was impaired to its full amount. The failure to make any examination is *not mere negligence, misjudgment or want of caution*,

*nor is it mere casual indifference to results or breach of duty. It amounts either to actual recklessness of results or to a wilful refusal to make the examination, so that they could innocently make a good report, when a true statement of the condition of the bank would perhaps have been ruinous * * *. After the warning of the comptroller and proof of the actual condition of the bank at the time of which the report speaks, the court is bound to hold that either defendants knew the actual condition and concealed it, or made the report recklessly. It is not necessary for the plaintiff to show that these defendants actually knew the report to be false; it is sufficient to maintain the action if he shows that the defendants attested this report, not knowing whether it was true or false, and not caring what the fact might be, BUT RECKLESSLY paying no heed to the injury which might ensue.* *Kountze v. Kennedy*, 147 N. Y. 124-129. Fraud is proven when it is shown that a false representation has been made knowingly or without belief in its truth or recklessly without caring whether it be true or false. Head note, *English Ruling Cases*, Vol. XII, p. 250. *Derry v. Peck*, 14 Ap. Cases 337. The fact that the defendants had reason to believe that the report was false and still made it, is evidence of their intent to deceive. *Salisbury v. Howe*, 87 N. Y. 135. The defendants, as directors of the bank, evidently were, at the time, in a difficult position. They at least knew, from the warning given by the comptroller, that the bank was probably in a bad financial condition. *What actual facts they knew concerning the condition of the bank is not disclosed by the evidence.* A report, however, showing losses to the amount of \$194,000, would more than wipe out the capital stock, surplus and undivided profits, as shown in the report, and would probably cause the ruin of the bank. The officers and directors of the bank *would naturally hesitate to make a report which would cause its ruin;* but, however, loyal this sentiment may be to the bank, it *cannot relieve these defendants from the consequences of making a report, either falsely or recklessly.* After the warning of the comptroller, and before attesting the report, the defendants *must have proceeded upon some reasonable inquiry and have had some apparently good ground for attesting the report as it stood.* (*Hammond v. Pennock*, 61 N. Y. 145-151) in order to relieve themselves from responsibility * * * When the report was made of the standing of the bank, it was made and published to disclose the financial condition of the bank, and to assure those who would deal with the bank; and, when it was attested by di-

rectors, they knew that, if not true, they were deceiving those who read it, both as to the standing of the bank and as to the value of the stock. In this particular case the statement assured the public that, not only the capital stock was unimpaired, but there was a surplus and undivided profits of \$63,000.00, when in fact there was no surplus or undivided profits, *and the capital was lost*. It is *not sufficient* here to say that this *report disclosed the actual condition* as shown by the *books of the bank*. These defendants *could not rely upon the books* after the warning they had received from the comptroller * * *

"It is said in *Haddock v. Osmer*, 153 N. Y. 608:

" 'An action to recover damages for deceit cannot be maintained without proof of fraud as well as injury. *Actionable deceit* cannot be practiced without an *actual intention to deceive*, resulting in actual deception and consequent loss. *But while there must be a furtive intent, it may exist when one asserts a thing to be true which he does not know to be true, as it is a fraud to affirm positive knowledge of that which one does not positively know. Where a party represents a material fact to be true to his personal knowledge, as distinguished from belief or opinion, when he does not know whether it is true or not, and it is actually untrue, he is guilty of FALSEHOOD, even if he believes it to be true; and, if the statement is thus made with the intention that it shall be acted upon by another, who does so act upon it to his injury, the result is actionable fraud. Kountze v. Kennedy, 147 N. Y. 124-130; Rothschild v. Mack, 115 N. Y. 7; Marsh v. Falker, 40 N. Y. 562-573; Bennett v. Judson, 21 N. Y. 238; Addison on Torts, 1007; 1 Bigelow on Fraud, 514.*' "

Upon review before the appellate division (108 N. Y. S. 454) that court decided that:

"The complaint contains all of the allegations necessary for the maintenance of the action under the national bank law; the findings of the court are sufficient to sustain the complaint; the evidence is sufficient to sustain such findings;"

And upon the record thus presented this court affirmed the decision, notwithstanding the lower court based its judgment upon the very principle for which we contend.

In discussing this case in the court below, defendants insisted it should be distinguished from the cases at bar be-

cause in the former the directors did not take the witness stand in their own behalf.

Suppose they had done so and admitted receiving the comptroller's letter, but testified that thereafter they never went near the bank, made no examination of its condition, took no part in the administration of its affairs and attested the report on the mere request of the cashier, knowing they had no actual knowledge of the Bank's true condition,—would they have been exonerated because of their blind faith in the integrity of the cashier? Certainly not,—for that decision was not predicated on the assumption that there had been proof of actual knowledge. The findings were in the alternative.

While two of the defendant directors in the cases at bar testified in their own behalf, their testimony shows they deliberately ignored the comptroller's directions and had no grounds for believing they had any knowledge of the Bank's condition. More than that, it shows it to have been impossible for them to know, for they never at any time participated in the least in the management of the Bank's affairs. It helps them less than if they had stood mute (as did the directors in the New York case), for they do not even attempt to give an excuse for violating the comptroller's directions; or to explain how they thereafter managed to keep themselves ignorant—if, indeed, they were ignorant.

EVIDENCE AFFECTING POINT IV.

It may be well to consider briefly at this time, the evidence on the question of knowledge prior to the receipt of the comptroller's letter.

It being undisputed that the bank was hopelessly insolvent from its very beginning, defendants attempt to evade liability by showing they had nothing to do with its management and knew nothing of its affairs, and, hence, could not knowingly make a false report.

Prior to January 10th, 1888, the by-laws provided for quarterly meetings. At this time they were amended on motion of defendant, Thompson, to provide for only semi-annual meetings—at the dividend declaring periods—and so they continued during the remainder of the time (Exhibit "X-26," B. of Ex. pp. 326, 339). And as before suggested the directors held but fifteen regular and two special meetings during nearly nine years of its existence.

TESTIMONY OF DAVID E. THOMPSON.

At the former trial of this case Mr. Thompson testified (B. of Ex., pp. 230-1) :

Q. "Then you sign these reports and take these mens' words for it, and send them out to the world as correct?"

A. "Yes, and you do, too."

Q. "You sign your name irrespective of the facts, you don't know what the true conditions are?"

A. "How could I know better?"

Q. "I simply want you to state this, that you are signing statements of the condition of that bank and taking someone else word entirely for the truth or falsity of the report?"

A. "That is what I am doing and I could not do different if I tried."

Q. "And that is what you did with the Capital National Bank?"

A. "Yes, sir."

Q. "And you did not know at that time whether the report was true or false?"

A. "I couldn't have known."

At the second trial he endeavored to avoid admitting he was conscious he had no actual knowledge, but his testimony shows it to have been impossible to have entertained a *bona fide* belief of actual knowledge. We quote from the record (B. of Ex., p. 433) :

Q. "How much of your personal time did you devote, if any, to the affairs of the bank and the administration of the bank?"

A. "None at all, except to attend meetings when I was in town. I was much of the time away from Lin-

coln, but when I was there I gave time enough to attend their annual meetings."

Bill of exceptions, pages 445-6:

Q. "Did you have any knowledge of the deposit account of Mosher and Outcalt?"

A. "I had no knowledge of it whatever."

Q. "At any time during the——"

A. "I had no knowledge of anything back of the room there where the directors and the executive committee met, and what came up there for discussion was the only knowledge I had of the condition of the bank."

Bill of exceptions, page 461:

Q. "Would you be able to check over a report?"

A. "No, sir, I would not."

Q. "Would it have been possible for you to have done otherwise than to credit the information such as you could obtain from anywhere other than the officers?"

A. "There would be no way that I could take a report and check it from any records, if that is what you mean?"

Q. "Yes, sir."

A. "I could not do it."

Bill of exceptions, pages 508-9:

Q. "Now in reference to various statements of the condition of the Capital National Bank. When these various statements were made that bear your signature, what effort did you make before permitting them to go out in that way to ascertain whether or not they were true?"

A. "Well, my only effort to know the truthfulness of *any statement* that was *ever made* there was simply through the executive committee, the finance committee and through the officers of the bank."

Q. "You never looked over any of the assets yourself?"

A. "No, sir, never."

Q. "Never counted any of its money?"

A. "Never counted any of its money."

Q. "Never made any examination into the actual assets at all?"

A. "No, sir, I never did."

Q. "Never examined any of the books of the bank?"

A. "No, sir, I never did; there was a committee that always had that in charge, a committee appointed by the

directors, a finance or executive committee and the officers of the bank who always did that; I never had anything to do with that; *anything on the inside of that bank.*"

Q. "You never looked into the books of the bank?"

A. "I don't see how a question of that kind can be answered."

Q. "I mean you never examined a book of that bank?"

A. "No, I never did; looking into a book is like looking into the Bible, you may look into it and not read it."

Q. "You never looked into the Bible much?"

A. "Well, I did a little."

Q. "When these statements went out purporting to give the condition of the bank, over your signature, you hadn't at that time any knowledge concerning its actual condition?"

A. "*Nothing at all*, except the information I would get from those I had trusted."

Q. "*But so far as personal knowledge went you knew nothing?*"

A. "*So far as personal knowledge, I knew nothing.*"

Q. "And you were aware of that fact?"

A. "Well, there was never a question entered my mind—never has been in anything I was interested in—that there could be anything wrong."

Q. "Well you were aware of the fact that you did not really know anything about its condition?"

A. "It never entered my mind in that way; I thought I did."

Q. "*But you never made any investigation?*"

A. "How could I make any?"

Q. "I am not asking you that."

A. "*I never did.*"

Q. "Then you never could know, of your own knowledge, what its condition was—you could know how much cash it had?"

A. "I could have counted the money, but that wouldn't mean anything."

Q. "You could have looked over its bills receivable?"

A. "Why, yes, I could have looked over its bills receivable and tell that they had eight hundred or two hundred thousand, but that would be all."

Q. "But you never did it?"

A. "No, sir, I never did it."

Q. "And yet you made these statements in which you stated there are a certain amount of liabilities and assets and cash?"

A. "I made those statements after the sworn statements of the officers."

Q. "*Absolutely on the statement of someone who handed you the statement?*"

A. "*That is very true.*"

Q. "And you say you have never examined any book of the bank?"

A. "I never have."

Bill of exceptions, page 510:

Q. "You say you did not know that either Mr. Mosher or Mr. Outcalt were borrowing from the bank?"

A. "I have no recollection of knowing that they were borrowing of the bank; those things, Mr. Thomas, are all things that did not come under my notice in any way at all."

Bill of exceptions, page 511:

Q. "Did you know there was any of the Western Manufacturing Company paper had been discounted by the Capital National Bank?"

A. "No, I never did."

Q. "Did you know that it carried any of the paper of that company in its bills receivable?"

A. "Well, I don't know that I would know definitely whether they did or did not. I have got to keep saying to you what I said before; we might have that in there and it *would not concern me at all*, because there were men there who were appointed to attend to those things and to look after the welfare of the bank, *and with me everything ended there.*"

Bill of exceptions, page 489:

Q. "Now these various banks in which you have been interested; you have kept some sort of an account of what they were doing?"

A. "Nothing only what the men in charge have reported, and in there the same as that card, or what they would tell me; that is all, nothing else."

Bill of exceptions, pages 523-4:

Q. "The only meetings that you attended was at dividend declaring times, or did you attend other meetings than at the dividend declaring times?"

A. "I never, so far as I remember, attended any called meeting while I was in Lincoln, nor missed any of the regular meetings while I was in Lincoln. A man in business in Lincoln would be there most of the time, but I was in Lincoln comparatively little; my business was of a character that took me away from home most of the time."

Were it true the directors had committed the making and approval of loans to a discount or executive committee and delegated to it the entire management of the Bank's affairs, it would not relieve defendants from responsibility and liability. But even this contention is without foundation in fact—a mere pretense.

The Bank never had a discount committee in the sense in which that term is ordinarily used. Mr. Outcalt, the cashier, was asked (B. of Ex., p. 654) :

Q. "Did the bank have a discount committee?"

A. "No, sir, not exactly, as we would understand a discount committee. They had a committee to examine the loans of the bank."

In the comptroller's letter of February, 1892 (Exhibit "948," B. of Ex., p. 78), he states that the bank examiner reports, the Bank has no discount nor examining committee and suggests that by law the conduct of the affairs of a national bank is devolved upon the board of directors. In answer to this letter the directors wrote the comptroller, under date of February 19th, 1892 (Exhibit "944," B. of Ex., p. 64), that

"About a year since Mr. W. W. Holmes died suddenly and left only one member. The place has now been supplied by the appointment of Mr. E. P. Hamer."

Speaking of the February, 1892, meeting at which this appointment was made, Mr. Hamer testified (B. of Ex., p. 597) : "*There was no finance committee and one of the things done was to say that I should serve on the finance committee.*"

It is quite evident the committee was not active and was not considered of much importance.

The directors' minute book clarifies the situation. It shows (B. of Ex., p. 340), that at a directors meeting (held probably in January, 1889) :

"Mr. Thompson moved that directors Holmes and Stuart be appointed a committee to *examine the notes of the bank* and also to make as many such examinations of notes and books as they may see fit."

Under this appointment the committee apparently made the following report (B. of Ex., p. 340):

"Lincoln, Neb., Jan. 20, 1889.

"As per instructions of board of directors we have examined paper of Capital National Bank and find same satisfactory.

(Signed) "W. W. HOLMES,
"A. P. S. STUART."

This committee is never heard from again until February, 1892, when, in response to the criticism of the comptroller, E. P. Hamer was put on the committee in place of W. W. Holmes, deceased (B. of Ex., p. 344). It is quite evident it was not a "discount committee" at all. The Bank never had one.

The language of Mr. Thompson's motion creating this committee, shows it was merely to "*examine notes of the Bank*"—functions of an auditing committee.

It gave them no authority to pass on applications for loans—proper functions of a discount committee.

TESTIMONY OF CHARLES E. YATES.

Bill of exceptions, pages 572-3:

Q. "Now do you say that you never attended a meeting when any of the bills receivable—paper of the bank was taken up and looked over and discussed?"

A. "No, sir, not when I was at the meeting."

Q. "You did not know of any of this Western Manufacturing Company paper?"

A. "No, sir."

Q. "Of which Hurlbut was manager?"

A. "No, sir."

Q. "Well, did you sign any reports of the Bank's condition?"

A. "You mean those statements?"

Q. "Yes, sir."

A. "Why, when I was in the office there if Hal Young or some other employee of the bank would bring one of the statements down, I would see it was signed and attested by Mosher and Outcalt, and in good faith I signed it."

Q. "And that's about all you knew about it?"

A. "That is about all I knew about it; I had my confidence in those people, and in the examiner of the bank."

Q. "You never made an investigation yourself as to what the bank had in the way of assets?"

A. "No, sir."

Q. "Never looked over the bills receivable?"

A. "No, sir."

Q. "Never looked over its assets?"

A. "No, sir, never was behind the counter."

Q. "Never counted its cash?"

A. "Oh, no."

Q. "Never attempted to look over its depositors?"

A. "No, sir. I had my faith in the officers of the bank."

Q. "You never made any inquiry of that kind?"

A. "No, sir."

Q. "I suppose you had no knowledge whatever of its financial condition?"

A. "Oh, no."

Q. "And of course you were aware of that fact—that you did not know anything about it of your own knowledge?"

A. "Oh, yes,—yes, sir,—but the truth of the matter was, Mr. Thomas, that I was a pretty busy man, and was out on the road about three-fourths of the time and when I came in I suppose if they wanted anything I would have signed it."

Bill of exceptions, page 574:

Q. "And your recollection is that you don't remember of any discussion at a directors' meeting in regard to any of the paper?"

A. "Oh, no."

Q. "Never was anything of that kind?"

A. "Oh, no."

Bill of exceptions, pages 570-1:

Q. "Never heard about the Donnell, Lawson & Simpson account?"

A. "No, sir."

Q. "Nor about any of the Marsh paper?"

A. "No, sir."

Q. "Nor any of the Western Manufacturing Company paper?"

A. "No, sir."

Q. "Nor any of Mosher's paper?"

A. "No, sir."

Q. "Nor Outcalt's paper?"

A. "No, sir."

Q. "In fact you did not know anything about any of the paper that was in the Bank?"

A. "No, sir."

Q. "Did not know there was any directors' paper in the bank except your own?"

A. "No, sir."

Q. "You say you did not even know E. Hurlbut, Jr.?"

A. "No, sir."

Q. "Did not know that the Bank ever had any losses of any kind?"

A. "No, sir."

Q. "That never came to your attention in any way?"

A. "No, sir."

Q. "Was never discussed at a directors' meeting?"

A. "No, sir."

Q. "You say you never examined any paper of the bank?"

A. "No, sir."

Q. "Never looked at a note?"

A. "No, sir."

Q. "Or any of the documents of the bank at all?"

A. "No, sir."

Q. "Well then you hadn't very much to do with the directing of the Bank, had you?"

A. "Hadn't anything."

Q. "I suppose you attended the meetings when it came time for the dividends and voted aye?"

A. "Oh no, there were lots of times that they passed dividends that I wasn't there."

Bill of exceptions, page 577:

Q. "Now, Mr. Yates, you never knew that the bank carried any real estate either did you?"

A. "No, sir."

Q. "And did not know that it carried any overdrafts?"

A. "No, sir, did not know anything about it."

Q. "Or re-discounts?"

A. "No, sir."

How could they have been less attentive or more grossly negligent? In these circumstances no one could have honestly believed he had any actual knowledge of the Bank's affairs. There was no possible ground for such a belief. Knowledge was impossible. They could have attested a report of the condition of the Bank of England with the same assurance, for they had as much knowledge of its condition as they had of the Capital National Bank.

POINT V.

That After Receiving the Letters from the Comptroller of the Currency, Shown by the Record, It Was the Directors' Duty to Enter Upon the Discharge of Their Functions and Acquaint Themselves With the Affairs of the Association, and Their Failure to Do So Was Gross Negligence and Recklessness, or a Deliberate Refusal to Perform Their Duty, and Constituted an Intentional Violation Actionable Under Sec. 5239, Rev. Stat. U. S.

(A) That if, Thereafter, Directors Make or Attest Statements of the Association's Financial Condition, or Permit Its Officers, Agents or Servants to Do So, and Such Statements Are in Fact False and Untrue, They Are Liable in Their Personal and Individual Capacity for All Damages Which a Depositor May have Suffered in Consequence of Such False Representation, Regardless of Whether or Not the Directors Had Actual Personal Knowledge of Their Falsity.

(B) That Upon Receipt of the Letters Aforesaid It Was the Duty of the Directors to Acquaint Themselves With the Affairs of the Association, and They Are Presumed to Have Such Knowledge of Its Condition as a Performance of Their Duty Would Have Given Them.

We submit the foregoing propositions are fairly established by *Thomas v. Taylor, supra*, and the cases discussed in the preceding points.

The comptroller's letters, to which reference is made, are set forth and discussed in Point VII. After these letters it were bold to further simulate excuses. Here was a direct warning that by law the conduct of the affairs of a national bank devolved upon the board of directors; that regular and frequent meetings are therefore *very* desirable. That they meet but twice a year and then only to go through the empty form of declaring dividends; that they do not examine the loans and discounts; that they have neither a discount nor examining committee; that the bank examiner reported \$30,000 in losses that were charged off during the examination; that the affairs of the Bank had suffered through the inattention of its executive officers. And it specifically called attention to matters which, if investigated, would have inevitably led to a discovery of the Bank's desperate condition.

To instance: The bank examiner evidently thought \$30,000 in losses had been charged off during his examination, but he was deceived. Nothing was, in fact, charged off. And at the following meeting the usual dividend was declared (directors' meeting July 12, 1892, B. of Ex., pp. 995-8), where, had the examiner's directions been obeyed, the directors would have known the losses exceeded more than twice the apparent earnings.

This \$30,000 was not charged off at all; and the startling truth is that never, during its existence as the Capital National Bank, were any bad debts charged off.

That the directors were not without knowledge of this matter is established by their letter of September 19th, 1892, to the comptroller, wherein, among other things, they pretend

to justify the July dividend. This letter was in answer to the comptroller's letter of August 31st, 1892, which we were unable to find. It no doubt expressed surprise that a dividend of \$12,000 could be declared in July, 1892, after having suffered \$30,000 in losses in February preceding.

With all this information (and other to which reference is made later) :

"They, notwithstanding, represented the assets to be good. Such disregard of the directions of the officers appointed by the law to examine the affairs of the Bank is a violation of the law. Their directions must be observed. Their functions and authority cannot be preserved otherwise and be exercised to save the banks from disaster and the public who deal with them and support them from deception."

Thomas v. Taylor, supra.

The directors cannot plead ignorance, for it could not exist except for their own most gross negligence, recklessness and deliberate refusal to do their duty. And in this circumstance every director is liable in his "personal and individual capacity" for false statements of the Bank's condition, which he made or permitted to be made by "any of the officers, agents or servants of the association,"—or which he "participated in or assented to" (Sec. 5239, Rev. St. U. S.).*

* Note.—Sec. 5239—

"If the directors of any national banking association shall knowingly violate, or knowingly permit any of the officers, agents, or servants of the association to violate any of the provisions of this Title, all the rights, privileges, and franchises of the association shall be thereby forfeited. Such violation shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. And in cases of such violation, every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of such violation." Rev. Stat. U. S.

He is not relieved from liability because he did not personally "attest" a particular report. He knew that under the law, the association, of which he was a director, was required to make and publish not less than five reports during each year exhibiting in detail and under appropriate heads the resources and liabilities of the association. He knew the reports were being so published and that the depositors were looking to them as their only source of information—to guide them in safeguarding their interests and the deposits of their own patrons. He knew, or must have known, the reports to be false, and cannot escape liability by the simple expedient of refraining from affixing his signature to the statement. His duty is to assert his authority,—to be active,—and his obligation is not performed by mere passive acquiescence. Unless this be true, the statute, intended to protect the public, becomes a farce, for Sec. 5211, Rev. Stat. U. S.* does not require the published report to bear the names of the attesting directors. It provides that "in the same *form* in which it (the report), is made to the comptroller (it) shall be published in a newspaper."

At the time the reports in controversy were published, the comptroller of the currency required the reports prepared for publication to be sworn to by the president or cashier and

* Note—

"Sec. 5211. Every association shall make to the Comptroller of the Currency not less than five reports during each year, according to the form which may be prescribed by him, verified by the oath or affirmation of the president or cashier of such association, and attested by the signature of at least three directors. Each such report shall exhibit, in detail and under appropriate heads, the resources and liabilities of the association at the close of business on any past day specified by him; and shall be transmitted to the Comptroller within five days after the receipt of a request or requisition therefor from him, and in the same form in which it is made to the Comptroller shall be published in a newspaper published in the place where such association is established, or if there is no newspaper in the place, then in the one published nearest thereto in the same county, at the expense of the association; and such proof of publication shall be furnished as may be required by the Comptroller. The Comptroller shall also have power to call for special reports from any particular association whenever in his judgment the same are necessary in order to a full and complete knowledge of its condition." Rev. Stat. U. S.

attested by the signature of at least three directors,—and so it was done in these cases (Exhibit “972,” p. 419).

At the present time the form prescribed for the published report contains the following directions of the comptroller:

“This form is for publishers’ copy and does not have to be sworn to.

“The affidavit, jurat and signatures of officers are to be copied from report of condition.”

Under the law, the comptroller need not require the names of the attesting directors to appear in the published report, (as we understand was at one time the practice), and still be within the requirements of section 5211, Rev. Stat. U. S., for that section provides for the making of reports to the comptroller “according to the *form* which may be prescribed by him, verified by the oath or affirmation of the president or cashier, and attested by the signature of at least three of the directors,”—and it is in the “*form* in which it is made” to him that it shall be published.

This plainly commands publication of neither the verification nor the attestation and should the comptroller dispense with this requirement, directors could never become liable, if it be true that they are only responsible for reports personally attested by them.

The attested report sent to the comptroller is not open to public inspection and could not become the basis of an action of this sort, hence, by the selection of an irresponsible cashier, a depositor would be left without an effective remedy.

It cannot be congress intended that directors should thus be permitted to be relieved from liability.

Under the present regulations of the comptroller for the preparation of copy for the published report, a director might plausibly assert his non-liability for the reason that he had not personally attested the report. He could be held, if at all,

on the ground that he knew, or must have known, that the officers of the association would cause to be published a report of its condition, upon which the directors' attestation would appear, and if he assented to or permitted it, his liability would become fixed.

The principle for which we contend is supported by *Chesbrough v. Woodworth*, 195 Fed. 875. This was an action involving liability of directors for false reports not attested by them. The court said:

"In such a case as this, the making of the report, its attesting by the directors, and its publication do not constitute the underlying wrong. They make only the means of representation to plaintiff—the medium of necessary casual relation between wrong and damage. Under what is said to be the universal practice of national banks in making such reports and under what the undisputed testimony shows to have been the regular practice in this Bank, the making and publishing of the reports were the automatic results of the bookkeeping. Whatever the books and the daily statements showed the resources to be, appeared as resources on the report. If a line of paper was carried at its face among the 'loans and discounts' on the books, it would normally appear at that same amount in every one of the five reports in each year. Both defendants knew this. It follows that *it is not important whether each did or did not attest each report* (except so far as plaintiff's conclusion to buy might rest on the presence of a particular name at the foot of the report plaintiff saw). All directors who participate in and approve a long-continued carrying on the books, among loans and discounts, of a line which they know is worthless, and in amount sufficient materially to affect the standing of the bank, *are bound to know* that under the practice prevailing in this Bank such worthless paper will become an element of the published reports, and that these reports will insofar falsely represent to the public the Bank's condition; and so, in a fair sense, *such director permits the making of a report which is a violation of the act*. Hence his primary duty here involved, and a breach of which causes a violation of the statute, is the duty to charge off assets which have become worthless."

Our contention is in harmony with the oath the directors are required to take (Sec. 5147, Rev. Stat. U. S.)*,—that they “will not knowingly violate or *willingly* permit to be violated any of the provisions of this title” (Title LXII, National Banks).

According to the directors’ testimony they very *willingly* abdicated their entire functions and left the sole management of the Bank’s affairs to subordinate officers,—in which was included the publication of reports of the Bank’s condition.

They did it not only *willingly*, but were apparently anxious to rid themselves of their duty. They thus violated the very terms of their oaths when they permitted the officers to publish untrue reports.

The word “*willingly*” does not mean wilfully. It “is a weaker word, meaning voluntarily; readily; without reluctance; in the manner of being ready to do an act; of free choice; with one’s free choice or consent.”

C., St. L. & P. R. Co. v. Nash, 1 Ind. App. 298, 27 N. E. 564.

There is no pretense that their conduct in this regard was other than voluntary; of their own free choice. For, notwithstanding the comptroller’s letters directing attention to their violation of duty and urging them to act, they continued their policy of inaction and non-participation and willingly permitted their officers, agents and servants to have unlimited and unrestrained control of the Bank’s affairs.

* Note—

“Sec. 5147. Each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate, or willingly permit to be violated, any of the provisions of this Title, and that he is the owner in good faith, and in his own right, of the number of shares of stock required by this Title, subscribed by him, or standing in his name on the books of the association, and that the same is not hypothecated, or in any way pledged, as security for any loan or debt. Such oath, subscribed by the director making it, and certified by the officer before whom it is taken, shall be immediately transmitted to the Comptroller of the Currency, and shall be filed and preserved in his office.” Rev. Stat. of U. S.

POINT VI.

The State Court Erred in Deciding That to Entail Liability Under Sec. 5239, Supra, for the Publication of a False Official Report of the Bank's Condition, It Must Be Shown That the Director Had Actual Personal Knowledge of Its Falsity—"That **KNOWLEDGE MUST BE BROUGHT HOME TO THE DIRECTOR** That He Is Deceiving the Individual Wronged, and May Thereby Occasion a Loss to Him," or That He Personally Participated in the Act Complained of.

This follows as a corollary from the preceding propositions and requires neither demonstration nor citation of authority.

POINT VII.

The State Court Erred in Deciding That the Evidence in the Record Is Insufficient to Sustain Plaintiff's Judgment, Because Its Decision Is Based Upon an Erroneous Interpretation of Sec. 5239, Supra, and the Decision of This Court in These Cases.

It is apparent throughout the opinion of Hamer, J., that in weighing the evidence he applied an erroneous test of liability,—but for which his conclusion would have been otherwise.

The same is true of Letton, J., but he afterwards saw his error and voted to grant plaintiff's rehearing.

The dissenting opinion of Sedgwick, J., presents the situation correctly (93 Neb. 137), (Trans., p. 65):

"There is evidence that the comptroller became dissatisfied with the conditions of the Bank, and wrote to the officers of the Bank to call the attention of the directors to its condition and to send a statement of what they found to the comptroller. This was done, and these defendants signed the statement to the comptroller. It is therefore conclusive that these defendants knew the condition of the Bank. After this the reports were published as before, and the plaintiffs were deceived and damaged thereby. There is a large mass of evidence in the case, but it is useless to discuss it, in view of the total inadequacy of the opinion and concurring opinion to discuss, or even to state, the questions of law upon which this decision depends."

There is indeed a mass of testimony, much of which it will be unnecessary to review.

The decision of the state supreme court does not disturb the findings of fact of the trial court, as such, but holds those facts do not entail liability because they do not positively establish actual personal knowledge or personal participation. So the error really consists in mistaking the legal effect of the evidence.

Under the decision of the state supreme court the findings of fact of the trial court might be admitted and yet no liability ensue.

The concurring opinion of Letton, J., without which there could be no reversal, states that (93 Neb. 131), "under the holding of the supreme court of the United States as to the measure of duty and of liability of directors under the banking laws of the United States, I think a case has not been made. For that reason alone I concur in the conclusion."

This does not impeach the findings of fact of the trial court, but assumes that those findings do not establish liability under the rule laid down in the opinion of Hamer, J.

To illustrate: Suppose the comperoller's letters called specific attention to the fact that the report of September, 1891, was an untrue statement of the Bank's condition and tells the directors they must enter upon the performance of their duty and acquaint themselves with the Bank's condition; that they ignore his directions; give no attention to the Bank's affairs; acquire no knowledge of the Bank's condition, and thereafter attest an untrue report of such condition not knowing it is in fact false. Under the state court's view of the law, this does not establish liability under the national bank act.

However, whatever view may be taken of the situation, we maintain the evidence is sufficient to sustain the findings and judgments in these cases. Indeed, no other result was possible under the evidence.

EVIDENCE

That the Bank was insolvent from its inception is not denied. The trial court so found and the correctness of its

findings is not questioned. While this is true, we think a brief review of the Bank's early history is necessary to a comprehensive view of the situation.

The Bank was in such condition and its affairs managed in such manner that it is impossible to imagine the defendants ignorant of its condition and affairs without being guilty of the most wanton recklessness and wilful disregard of duty or a deliberate determination to remain ignorant.

Review of Bank's Condition From Time of Organization.

The Capital National Bank grew out of the Marsh Brothers, Mosher & Company, a concern organized mainly to attend to the collection affairs of the Marsh Harvester Companies and its kindred concerns at Sycamore, Ill., and incidentally doing some banking business (Hale, B. of Ex., p. 45; Scott, B. of Ex., pp. 349-50).

While these Marsh concerns were on the verge of bankruptcy (B. of Ex., p. 351) the Marsh National Bank was incorporated (June, 1883), with a purported capital stock of \$100,000.00. The Marshs, Mosher and Outcalt, became its officers and stockholders. Not a cent of actual money went into the assets of this corporation. It was a mere book transfer of the assets and liabilities of the Marsh Brothers, Mosher & Company *en masse*, to the Marsh National Bank. "The assets, liabilities and accounts of the Marsh Brothers, Mosher & Company, were transferred to the books of the Marsh National Bank and became the assets and liabilities of the Marsh National Bank" (Hale, B. of Ex., p. 417; Whitmore, B. of Ex., p. 106; Jones, B. of Ex., p. 184; Scott, B. of Ex., p. 350).

After the Marshs and their various concerns had become notoriously insolvent (Carnes, B. of Ex., pp. 16-17; Alden, B. of Ex., p. 21), the name of the Bank was changed to the Capital National Bank (May, 1884) (B. of Ex., p. 184). The capital stock was increased to \$200,000.00 (B. of Ex., p. 330). The Marshs withdrew as stockholders and officers and the present defendants became stockholders and directors and so con-

tinned until the failure of the Bank in January, 1893 (Stockholders' meeting, B. of Ex., pp. 332-344).

Among the so-called assets which were transferred from the books of Marsh Brothers, Mosher & Company, to the books of the Marsh National Bank were the following:

A. Bills receivable.....	\$248,029.33
B. Stocks and bonds.....	30,540.00
C. Collection account (overdrawn)....	14,573.32

A. Bills Receivable, \$248,029.33.

Bills receivable, \$248,029.33, consisted principally of paper taken by the various Marsh concerns for its manufactured products. Most of this was given for a "low-down binder" which proved a failure and payment of the paper was resisted and became very poor. It realized but 25 to 30 per cent of its value (Carnes, B. of Ex., pp. 19-20).

The Marshs and all their companies went into bankruptcy in June, 1884. Shortly before their failure, the Marsh National Bank held at least \$200,000.00 in such paper (Alden, B. of Ex., pp. 22-23). The assets of the Marshs and their various concerns did not realize sufficient to pay preferred claims of laborers—the general creditors receiving nothing (Carnes, B. of Ex., p. 17; Alden, B. of Ex., pp. 21-24).

The witnesses, Carnes and Alden, were thoroughly familiar with the affairs of the Marshs and their testimony shows how hopelessly insolvent they were (B. of Ex., pp. 15 *et seq.* and 20 *et seq.*).

Particular reference to this is made because notwithstanding their insolvency, a large amount of their paper was carried by the Capital National Bank. In fact there was not a time in the history of the Bank that it had not large amounts of such paper (Whitmore, B. of Ex., p. 314). On July 1st, 1891, the Marsh paper aggregated \$23,354.17 (Exhibit "UU," B. of Ex., p. 223). When the Bank failed it still carried over \$18,000.00 in notes of the Marshs (B. of Ex., p. 231).

The account of bills receivable, \$248,029.33, was probably worth not to exceed from 25 per cent to 30 per cent of its face value or approximately \$173,000.00 less than par.

B. Stocks and Bonds, \$30,540.00.

When the stock and bond account was transferred to the ledger of the Marsh National Bank it amounted to \$30,540, but on July 27, 1883, \$30,000.00 of this item was eliminated by erasing the figures "30," and in order to keep the apparent assets of the Bank the same, the bills receivable account was raised from \$240,029.33 to \$270,029.33 by erasing the figure "4" and substituting the figure "7." These changes occur in the books every day from July 2nd until July 27, 1883 (Hale, B. of Ex., pp. 47-50; Whitmore, B. of Ex., pp. 106-114; Jones, B. of Ex., pp. 187-8).

No bills receivable actually came to the Bank through these transactions. The entry was fictitious and made to secrete the loss of \$30,000 because this item of "stocks and bonds" consisted of stock in the Marsh Binder Mfg. Co., which had become worthless (Jones, B. of Ex., p. 188; Whitmore, B. of Ex., pp. 113-14).

C. Collection Account, \$14,573.32.

When this account was transferred its name was changed to "collection account, Marsh Brothers, Mosher & Co." It was a *debit in red ink* indicating it was overdrawn which would be an impossibility if it were an honest account (Jones, B. of Ex., p. 185). It was in fact fictitious and valueless and was diminished to the extent of \$10,000.00 by erasing the first figure "1," and increasing the debit balance of the Omaha National Bank by \$10,000.00 by a false entry.

In these three items alone were valueless assets of approximately over \$200,000.00, or twice the Bank's nominal capital stock.

Donnell, Lawson & Simpson, \$28,174.70.

Shortly before the name of the Bank was changed to the Capital National Bank, it had on deposit with Donnell, Law-

son & Simpson, as its New York correspondents, the sum of \$28,174.70. This firm failed about May 14, 1884, and the entire amount was lost. No part of it was ever paid (Lawson, B. of Ex., p. 54). Mr. Lawson was a member of the firm and testified that he had intimate knowledge of its affairs including this particular account with the Marsh National Bank (B. of Ex., pp. 52-53). That this loss was sustained was known to the stockholders and directors when the name was changed to the Capital National Bank and was discussed at the directors' meeting held at that time—May 23, 1884 (D. E. Thompson, B. of Ex., p. 430; E. P. Hamer, B. of Ex., p. 597). Yet the regular dividend was declared and \$1,500.00 "carried to surplus account" (Minutes, B. of Ex., p. 332), notwithstanding this loss amounting to 28 per cent of the bank's purported capital stock at that time. Not a cent of this was ever charged off on the books of the Bank.

Donnell, Lawson & Simpson Notes.

Although this firm had failed in May, 1884, and ceased to do business and its creditors realized nothing on their claims, the Capital National Bank continued to discount notes purporting to have been executed by Donnell, Lawson & Simpson, and the following notes of that firm were taken in by the Bank and became part of its assets from October 14, 1884, to August 13, 1885, to-wit (Jones, B. of Ex., pp. 189-90):

October 14, 1884	\$ 5,084.76
October 14, 1884	695.79
May 7, 1884	9,391.56
May 7, 1884	9,391.57
July 20, 1884	9,391.57
July 24, 1885	9,391.56
August 13, 1885	10,200.00
August 13, 1885	20,300.00

Altogether notes aggregating \$103,864.06 were so taken (Whitmore, Exhibit "ff," B. of Ex., p. 150, folio 654), when in truth no such notes were ever given or paid by the firm of Donnell, Lawson & Simpson; so they were not only worthless, but forged (Lawson's dep., B. of Ex., pp. 55-56).

How long these notes continued to be carried as assets of the Capital National Bank we do not know, but certain it is that as late as August, 1891, some of them were still in the Bank (B. of Ex., p. 150, Exhibit "dd," folio 651), and in the comptroller's letter of September 8, 1891 (which was based upon an examination of the Bank made August 19, 1891), he calls attention to the fact that the Bank expects "to sustain a loss of \$2,000.00 upon the notes of Donnell, Lawson & Simpson" (B. of Ex., p. 73). This letter was discussed at a meeting of the board of directors held in September, 1891 (B. of Ex., p. 353).

Bill of Exchange, \$29,968.00.

The above item was carried on the books of the Capital National Bank as an asset but on December 14, 1885, it was charged off and in its place was substituted three notes aggregating that amount as follows (Jones, B. of Ex., pp. 190-91) :

First National Bank of Hastings, Nebraska.....	\$10,000.00
First National Bank of Kearney, Nebraska.....	10,000.00
F. S. Johnson & Co., Milford, Nebraska	9,968.00

These notes were shown to have been forged and fictitious (Clark, B. of Ex., p. 99; Johnson, B. of Ex., p. 97).

Interest Paid Account.

It is a matter of common knowledge that banks pay interest on certain of their deposits. In this Bank such payments were charged to what was known as "interest paid" account.

Before a dividend could be honestly declared the amount of this interest paid account would have to be charged to the account of "undivided profits" and would of course diminish the profits to that extent. In order, however, to understate this expense item and thereby relatively increase the apparent profits so as to furnish a basis for dividends, numerous false credits were made to this account, the effect of which was to understate the amount of interest actually paid on deposits (Hale, B. of Ex., p. 50; Jones, B. of Ex., pp. 195-96; Whitmore, B. of Ex., pp. 124-26). The following is a schedule of such entries (B. of Ex., p. 126; Exhibit "pp," p. 197) :

December 29, 1884	\$ 813.00
April 14, 1888	2,500.00
June 9, 1888	1,500.00
November 16, 1888	2,500.00
June 28, 1889	10,000.00
September 30, 1889	7,000.00
March 19, 1890	5,000.00
May 16, 1890	1,500.00
May 19, 1890	2,000.00
May 21, 1890	1,500.00
June 3, 1890	2,500.00
September 25, 1890	5,000.00
December 27, 1890	10,000.00
April 9, 1891	800.00
May 2, 1891	7,200.00
June 20, 1891	10,000.00
September 25, 1891	14,000.00
February 2, 1892	2,103.00
May 4, 1892	5,000.00
Total	<u>\$90,916.44</u>

None of these items were charged against the "undivided profits" account or any similar account, which they must have been, had they been honest transactions (Whitmore, B. of Ex., pp. 126-27).

Certificates of Deposit.

The manipulation of certificates of deposit was one of the most resourceful means of abstracting the funds of the Bank and misrepresenting its actual condition. In many cases certificates of deposit were issued for which the Bank received nothing but which appeared to have been presented and paid at their face value.

The following certificates of deposit were shown to have been issued to J. E. Hill, state treasurer, and paid at their face value, while in fact they were fictitious, as Mr. Hill testified he had no such transactions and received no money on account of the certificates (Hill, B. of Ex., pp. 11-15, 49-59, 65):

Certificate No. 21349, Dec. 23, 1889, for \$	50,000.00
Certificate No. 24452, Apr. 24, 1891, for	100,250.00
Certificate No. 24937, July 18, 1891, for	14,650.00

Certificate No. 24941, July 20, 1891, for	10,000.00
Certificate No. 25097, Aug. 17, 1891, for	50,000.00
Certificate No. 25636, Nov. 18, 1891, for	50,000.00
Certificate No. 25961, Dec. 22, 1891, for	38,114.75

This indicates a total loss of \$263,014.75 to the Bank through these seven transactions.

In numerous other cases, deposits were actually made, certificates issued to the depositor for the correct amount, but practically all of the deposit abstracted and the books of the Bank made to show that the certificate was issued for a mere nominal amount instead of the amount actually deposited.

The details of some of such certificates aggregating \$179,934.23 is given in the bill of exceptions, pages 200-210.

The aggregate of losses on account of certificates of deposit amounted to \$584,107.73.

The stubs of the certificate of deposit book, as well as the other books of the Bank, indicated the certificates to have been issued at a very nominal amount so that the most casual comparison of the cancelled certificates with the stub book, the certificate register or the books of the Bank would have disclosed the discrepancy. The discovery of these discrepancies required no knowledge of bookkeeping (Whitmore, Orig. B. of Ex., pp. 974-5 and 1021-2).

A large number of the certificates of deposit were shown by the books to have been paid when in fact they were outstanding and unpaid. At the failure of the bank its books showed it to have outstanding in certificates of deposit \$86,265.70, when there was actually outstanding and unpaid the sum of \$517,999.49—a total discrepancy of \$431,733.79 (B. of Ex., pp. 37-8, 211).

Certificates of Deposit Account.

The Bank kept four separate and distinct "certificates of deposit" accounts some of which were overdrawn all of the time from 1888 until the failure of the bank in January, 1893 (Whitmore, B. of Ex., pp. 129-30; Jones, B. of Ex., pp. 211-

13). It is impossible for a certificate of deposit account to be overdrawn if properly and honestly kept (Whitmore, B. of Ex., p. 129; Jones, B. of Ex., pp. 212-13). No charge could be made against it except for the payment of the certificate previously issued, hence the debits could never exceed the credits (Jones, B. of Ex., p. 212). The mere fact that such account was overdrawn was proof positive of an irregularity. It was unnecessary to take footings to ascertain these overdrafts. The total was shown in red ink, which of itself, indicated an overdraft (Jones, B. of Ex., p. 213). The slightest inspection would have disclosed the fraud.

Relief Fund Duplication.

During the 1891 session of the legislature of Nebraska, bonds were authorized issued for \$100,000.00 to aid the drouth sufferers. They were sold for a net premium of \$250.00 and on April 24, 1891, the sum of \$100,250.00 was credited to the open account of "Nebraska Relief Fund," all of which was checked out by the relief fund committee except approximately \$3,000.00 (Ludden, B. of Ex., p. 44; Jones, B. of Ex., p. 200).

On the same day certificate No. 24452 for \$100,250.00 was issued payable to J. E. Hill, treasurer. This is one of the certificates Mr. Hill testified was fictitious and represented no actual transaction.

This certificate of deposit was used to take the place of other assets of the bank aggregating an equal amount. The history of these transactions is shown at bill of exceptions, pages 200-201.

Books Out of Balance \$100,000.00 for Three Years.

On December 24, 1889, the account of the "state treasurer" had a credit of \$23,328.75. On the same day a credit entry of \$100,000.00 appears in the same account without any corresponding debit entry. The result was to throw the books out of balance in the sum of \$100,000.00 and they remained in this condition from *December 24, 1889, to December 28, 1892* (Whitmore, B. of Ex., pp. 140-42). Any Bank officer

could have discovered this fact by mere inspection at any time. It was unnecessary to add up any figures (Whitmore, B. of Ex., pp. 143-44). The books in this regard were inspected by the trial court (B. of Ex., p. 144).

The books were brought into balance by putting in notes of Mosher and Outcalt (Whitmore, B. of Ex., p. 143).

Western Manufacturing Co. Notes.

One of the principal assets of the Capital National Bank were notes of the Western Mfg. Co., signed by E. Hurlbut, Jr.

This company was organized in 1884 and ceased doing any business in 1889 except to manufacture notes for the Capital National Bank. Its capital stock was all borrowed from the Bank and it lost that (Hurlbut, B. of Ex., p. 103); and after this company had failed as a manufacturing corporation it began the active work of manufacturing notes for the Capital National Bank and from July 24, 1888, until the failure of the Bank, notes of this concern aggregating \$755,000.00 (B. of Ex., p. 219), were discounted by the Bank and entered as a part of its assets. At the date of the Bank's failure it still held notes of the Western Mfg. Co., aggregating \$235,000 (B. of Ex., pp. 229-31), not a cent of which was paid. This sum nearly equalled the Bank's purported capital stock while the law prohibited it from loaning more than 10 per cent of its capital to any one person or corporation. This company was in reality a myth and its notes were never of any value (McDonald, receiver, B. of Ex., p. 26). The mere presence of one of these notes among the assets of the Bank was sufficient to put the directors upon inquiry.

Paid Out in Dividends.

From January, 1885, until July, 1892, the Bank paid in dividends \$251,750.00, when it was never in condition to pay any dividends (B. of Ex., p. 199).

Worthless Paper at Suspension.

When the bank failed it carried the following worthless notes as part of its assets (B. of Ex., pp. 227-33):

C. W. Mosher	\$ 85,281.67
R. C. Outcalt	54,146.66
Mosher & Outcalt	5,832.00
E. W. Mosher	107,085.45
Western Mfg. Co.	235,000.00
So. Stave & Lbr. Co.	5,346.15
Marsh paper	18,192.00
W. A. Sharrar (affiliated with the Marshes)	7,153.76
W. A. Barstow	8,062.02

Total\$526,299.71

(This is not all of the bad paper but merely such as was notoriously bad and which the directors knew was either bad or in excess of the legal limit.)

The Bank also had the following overdrafts at the above date (B. of Ex., p. 233) :

C. W. Mosher.....	\$ 2,927.59
Mosher & Outcalt.....	8,983.36
E. Hurlbut, Jr.....	1,756.09
Western Mfg. Co.....	1,361.79
Stark & Mosher.....	1,691.84

Total\$16,720.67

Up to July 1st, 1891, the Bank had sustained losses which were definitely traceable to the enormous sum of \$817,650.87 (Exhibit "XX," B. of Ex., p. 234), yet in its report of July 18, 1891, attested by D. E. Thompson and C. E. Yates, the following flattering condition was disclosed (folio 1076, sheet 4, B. of Ex., pp. 346-7) :

RESOURCES.

Loans and discounts.....	\$ 898,011.57
Overdrafts, secured and unsecured.....	12,834.98
U. S. Bonds to secure circulation.....	50,000.00
Stocks, securities, claims, etc.....	2,913.49
Due from approved reserve agents.....	51,984.76
Due from other national banks.....	23,946.91
Due from state banks and bankers.....	2,880.04
Banking house, furniture and fixtures.....	5,770.00
Current expenses and taxes paid.....	3,815.30
Premium on U. S. bonds.....	1,437.50
Checks and other cash items.....	5,662.26
Exchanges for clearing houses.....	4,544.50
Bills of other banks.....	11,145.00

Fractional paper currency, nickels and cents....	251.70
Specie	31,350.00
Legal Tender notes.....	14,445.00
Redemption fund with U. S. Treas. (5 per cent circulation)	600.00
Total	\$1,121,593.01

LIABILITIES.

Capital stock	\$ 300,000.00
Surplus fund	30,000.00
Undivided profits	17,304.87
National bank notes outstanding.....	45,000.00
Individual deposits subject to check.....	\$367,258.70
Demand certificates of deposit.....	139,199.07
Cashiers' checks outstanding.....	3,229.16
Due to state banks and bankers....	47,783.89— 611,897.04
Notes and bills rediscounted.....	117,391.10
Total	\$1,121,593.01

Not only did this report grossly exaggerate the Bank's assets and understate its liabilities as they in fact existed for up to July 1, 1891, it had sustained losses aggregating over \$800,000—but it did not even truthfully state them as shown by the Bank's books. The following is a schedule showing the discrepancies between the published statement and the books of the Bank at the close of business July 9, 1891 (compare B. of Ex., pp. 346-7, folio 1076, sheet 4, and p. 169, Exhibit "1047") :

	Amount shown by bank books.	Amount as published.	Misstate- ments.
Loans and discounts....	\$ 801,780.97	\$ 898,011.57	\$ 96,230.60
Overdrafts	62,885.24	12,834.98	50,050.26
Stock and bond account	52,913.49	2,943.49	49,970.00
Bills of Exchange.....	9,332.75	None.	9,332.00
Due from all banks....	6,628.70	78,811.71	72,183.01
Real estate	56,320.60	None.	56,320.60
Deposits	496,840.91	611,897.04	215,065.13
Total	\$1,058,707.77	\$1,121,593.01	\$ 62,585.24

Similar discrepancies existed as to the other reports offered in evidence. Mr. Whitmore made a comparison of each of

these reports with the books of the Bank and testified to the discrepancies which existed between the books and the reports (Whitmore, B. of Ex., pp. 159-177, 293-4). In no case did the books and the reports agree.

The statement of the Bank's condition as of September 30, 1892 (which was signed by E. P. Hamer), showed the condition of the Bank as follows:

"Lincoln Daily Call, Friday evening, Oct. 7, 1892.

Report of condition of Capital National Bank at Lincoln, Nebraska, in the state of Nebraska, at the close of business September 30, 1892 (B. of Ex., p. 629, Ex. A-4):

RESOURCES.

Loans and discounts.....	\$ 757,762.79
Overdrafts secured and unsecured.....	3,971.48
U. S. Bonds to secure circulation.....	50,000.00
Stocks, securities, etc.....	7,551.45
Due from approved reserve agents.....	84,163.35
Due from other national banks.....	7,442.92
Due from state banks and bankers.....	2,355.17
Banking house, furniture and fixtures.....	5,770.00
Other real estate and mortgages owned....	38,617.93
Current expenses and taxes paid.....	8,079.84
Checks and other cash items.....	3,359.23
Exchanges for clearing house.....	19,544.74
Bills of other banks.....	1,265.00
Fractional paper currency, nickels and cents	341.90
Specie	27,038.00
Legal tender notes.....	15,047.00
Redemption fund with U. S. Treasurer, 5 per cent of circulation.....	1,250.00
Total	\$1,033,561.11

LIABILITIES.

Capital stock paid in.....	\$ 300,000.00
Surplus fund	6,000.00
Undivided profits	11,978.00
National bank notes outstanding.....	45,000.00
Individual deposits subject to check	\$271,958.80
Demand certificates outstand- ing	138,932.44
Cashiers' checks outstanding...	1,339.99

Due to other national banks...	96,113.01	
Due to state banks and bankers	132,269.41—	640,612.75
Notes and bills rediscounted.....		26,967.67
Total		<u>\$1,033,561.11</u>

The statement of the Bank's condition as of December 9th, 1892 (which was signed by C. E. Yates), showed the condition of the Bank as follows:

Report of the condition of the Capital National Bank, at Lincoln, in the state of Nebraska, at the close of business December 9, 1892 (B. of Ex., p. 845, Ex. X-979):

RESOURCES.

Loans and discounts.....	\$ 768,601.44
Overdrafts secured and unsecured.....	6,217.74
U. S. Bonds to secure circulation.....	50,000.00
Stocks, securities, etc.....	325.00
Due from approved reserve agents.....	107,090.01
Due from other national banks.....	17,800.33
Due from state banks and bankers.....	5,394.72
Banking house furniture and fixtures.....	5,770.00
Other real estate and mortgages owned.....	38,617.92
Current expenses and taxes paid.....	14,286.28
Checks and other cash items.....	3,698.56
Exchanges for clearing house.....	8,841.16
Bills of other banks.....	2,355.00
Fractional paper, currency, nickels and cents	298.71
Specie	26,789.50
Legal tender notes.....	17,431.00
Redemption fund with U. S. Treas. (5 per cent of circulation).....	1,350.00
Total	<u>\$1,074,867.37</u>

LIABILITIES

Capital stock paid in.....	\$ 300,000.00
Surplus funds	6,000.00
Undivided profits	21,180.75
National bank notes outstanding.....	45,000.00
Individual deposits subject to check	\$356,139.33
Demand certificates of deposit.	158,545.88
Due to other national banks...	81,574.14
Due to state banks and bankers	47,372.89— 643,632.24
Total	<u>\$1,074,867.37</u>

The following is a list of the official published reports introduced in evidence that were attested by the defendants:

ATTESTED BY D. E. THOMPSON.

1. December 28, 1886 (B. of Ex., p. 81).
2. August 1, 1887 (B. of Ex., pp. 82, 631).
3. December 19, 1890 (B. of Ex., p. 91).
4. July 9, 1891 (B. of Ex., p. 92).

ATTESTED BY C. E. YATES.

1. December 28, 1886 (B. of Ex., p. 81).
2. December 9, 1892 (B. of Ex., p. 84).
3. December 12, 1888 (B. of Ex., p. 86).
4. September 30, 1889 (B. of Ex., p. 88).
5. July 9, 1891 (B. of Ex., p. 92).
6. December 2, 1891 (B. of Ex., p. 95).

ATTESTED BY E. P. HAMER.

1. September 25, 1891 (B. of Ex., p. 94).
2. September 30, 1892 (B. of Ex., p. 629).

The last statement offered in evidence purported to give the Bank's condition as of December 9, 1892. An examination of it discloses the Bank to be in a flourishing condition.

The full extent of its insolvency could not be definitely determined until the bank came into the hands of the receiver in the following month. We present herewith a schedule showing the Bank's assets and liabilities as disclosed by its own books and the actual value of the assets and the extent of its liabilities as shown by the receiver's books. The latter items are compiled from the testimony of Mr. McDonald, receiver:

Assets of Bank on January 21st, 1893.

	As shown by Bank's Books.	As ent. on Receiver's Books.	Actual Value.
Cash	\$ 28,731.79	\$ 15,385.87	\$ 15,385.87
Furniture, etc.	5,770.00	300.00	300.00

Stock and bonds.....	325.00	325.00	325.00
Cash items		13,330.68	4,280.85
Overdrafts		33,767.20	4,771.57
Bills of exchange.....	4,997.97	4,997.97	4,778.02
U. S. Bonds.....	5,000.00	5,000.00	3,250.00
Bills receivable	851,880.97	519,600.00	41,500.26
Other assets	134,452.57	145,886.44	105,902.95
Total	\$1,031,157.40	\$738,583.16	\$180,491.52

Liabilities of the Bank on January 21st, 1893.

	As shown by its books.	Actual Amount.
Due National banks.....	\$ 39,675.33	\$ 47,759.56
Due State banks.....		114,349.62
Individual deposits	510,142.73	392,639.64
Certificates of deposit.....	97,301.27	517,999.49
Re-discounts	68,694.72	331,359.86
Other claims		56,954.21
Clearing house	965.05	
Capital stock	300,000.00	300,000.00
Total	\$1,016,780.00	\$1,761,062.38
Books overstated assets.....		850,662.88
Books understated liabilities.....		744,282.38

Total discrepancy between the Bank's books
and its actual condition January 21, 1893. \$1,594,945.26

Total assets \$ 180,491.52
Total liabilities \$1,761,062.38

Does it seem possible that this condition could exist and
the directors be ignorant of its condition?

By-Laws of the Bank.

Prior to the time these defendants became directors of the Bank its by-laws provided for quarterly meetings, but on January 10th, 1888, they were amended on motion of D. E. Thompson so as to provide for meetings only on the second Tuesday of January and July—the dividend declaring periods (B. of Ex., pp. 326, 339, 472).

Right to Permit Overdrafts.

Prior to the time these defendants became directors, the Bank's by-laws did not permit overdrafts (B. of Ex., p. 326).

but on January 10th, 1888, by motion of D. E. Thompson, section 17 of the by-laws were amended to *authorize overdrafts on approval of the president or cashier* (B. of Ex., p. 339). This provision was in conflict with the national banking law. It seemed to be necessary in order to make the directors' abdication complete.

In the directors' letter to the comptroller under date of February 23, 1892 (to which reference will be made later), in referring to overdrafts to which attention had been directed, they said that "the records of the Bank will show specific instruction to the officers by resolution of the directors not to allow overdrafts." This statement was untrue, as the minutes of the January, 1888, meeting show (B. of Ex., p. 339).

The defendants were elected directors on May 23, 1884, to commence May 31, 1884 (B. of Ex., p. 332). After this and before the Bank was turned over to the examiner, the directors held *fifteen regular and two special meetings—during a period of nearly nine years* (B. of Ex., pp. 334 to 344). Substantially all the business transacted at the regular meetings was to elect officers and declare dividends. As to the special meetings—all the business transacted at the first (October 15, 1886), was to authorize the president "to endorse notes and bills discount" of the bank "when it became necessary to discount same" (B. of Ex., p. 337).

The second (February 20, 1892), was called for the purpose of considering a "communication received from the comptroller regarding some matters pertaining to the Bank affairs," the minutes recite; and "a full explicit reply was made thereto" and "signed by each director." Also, at this meeting, E. P. Hamer was put upon the so-called "discount committee" in place of W. W. Holmes, who had died a year previous (B. of Ex., p. 344). This meeting was held at the Burr block instead of at the Bank (B. of Ex., p. 396).

The letter of September 8, 1891, was as follows (Exhibit "945," B. of Ex., p. 73):

"Sir: The report of an examination of your bank, made on the 19th ultimo, has been received. The following loans appear to exceed the limit prescribed by section 5200 U. S. R. S.:

"E. W. Mosher.....	\$46,355.98
"G. W. Small.....	56,478.20

"It appears from the report that your bank holds real estate mortgages to secure the latter loan, which were acquired May 30, 1886. Your attention is respectfully called to section 5137, U. S. R. S., which provides that: 'No such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it for a longer period than five years.'

"The examiner reports that when your last report of condition was made to this office you had overdrafts amounting to \$55,004.47, as shown by your books, while you only reported \$12,418.97, and classed the remainder as loans and discounts.

"You are respectfully informed that your reports and published statements should show the full amount of this item as it appears on the books of your bank.

"The practice of allowing overdrafts should be avoided so far as practicable. Demand notes could be taken in all cases for temporary loans.

"Overdue paper is reported amounting to \$106,760.25, of which \$14,000.00 is classed as 'bad debts,' as defined by section 5204, U. S. R. S. Such of the overdue paper as is good should be collected or made active by renewal, with satisfactory security for payment after reasonable extension. The 'bad debts,' unless satisfactorily arranged in the meantime, should be charged off prior to declaring a dividend.

"Your premium account should be charged off, as the $4\frac{1}{2}$ per cent U. S. bonds have no premium value in the market.

"The examiner reports that you expect to sustain a loss of \$2,000 upon the note of Donnell, Lawson and Simpson and \$2,500 upon your suspended and overdue paper, which together with the \$14,000.00 'bad debts' you intend to charge off before declaring a dividend.

"It is noted that your current expenses exceed your undivided profits by \$4,830.87. It appears from the report that your bank has a large liability on account of

notes and bills rediscounted, which the examiner states has been occasioned by the falling off in your deposits. It is respectfully suggested that some of your loans be called in as soon as practicable.

"The examiner reports that your board of directors has held only two meetings during the past year, and there is no record of their having examined or approved of the loans and discounts.

"It is respectfully suggested that the conduct of the affairs of a national bank is by law devolved upon the board of directors, and regular and frequent meetings are therefore very desirable.

"Respectfully yours,

"R. M. NIXON,

"Deputy and Acting Comptroller."

This letter was the subject of a discussion at a meeting of the directors in September, 1891, concerning which Mr. Scott testified.

On February 16th, 1892, the comptroller wrote the following letter (Exhibit "948," B. of Ex., p. 77):

"Sir: The report of an examination of your bank, made on the 26th ultimo, has been received. The following loans appear to exceed the limit prescribed by Sec. 5200, U. S. R. S.:

"E. W. Mosher.....\$50,950.28

"G. W. Small..... 51,752.53

"The examiner reports that you have some loans that have been carried along for a number of years, which he thinks should be collected as soon as practicable, and includes the above excessive loans in this class. He also thinks that Mr. Mosher's liability as an endorser is too large.

"The agreement of Messrs. R. C. Outcalt and C. W. Mosher to reduce their liabilities, and in future adjust all accounts so that overdrafts will be confined to those of a temporary nature, and also that they will close the bulk of their outside interests, and give their attention to the affairs of the bank, is received. The examiner states that owing to these outside dealings the business of the bank has suffered.

"Overdrafts are reported amounting to \$60,936.78. Please inform me to what extent these have been reduced since the examination. The practice of allowing over-

drafts should be avoided so far as practicable. Overdue paper is reported amounting to \$104,868.19, of which \$14,500 is classed as 'bad debts,' as defined by Sec. 5204, U. S. R. S. Such of this overdue paper as is good should be collected or made active by renewal, with satisfactory security for payment after a reasonable extension. The examiner reports that losses aggregating \$30,000, including the amount of 'bad debts' reported above, were charged off during the examination.

"The examiner reports that your by-laws require the board of directors to meet only twice a year, and that they often only go through the form of declaring a dividend, and do not examine the loans and discounts. He states that you have no discount nor examining committee. It is respectfully suggested that the conduct of the affairs of a national bank is by law devolved upon the board of directors, and regular and frequent meetings are therefore very desirable.

"It appears from the report that your bank was borrowing \$137,234.16 on notes and bills rediscounted, and that it has been borrowing money continuously during the past year. The examiner states that the amount of your borrowings have been largely reduced since his previous examination, and it is suggested that all this liability be paid off, and that the implied power to borrow money should be reserved for emergencies, and not habitually used for the purpose of procuring banking capital. The necessity for borrowing appears to have arisen from the excessive loans made, and your first effort should therefore be to realize on these by reducing them to the lawful limit. Special effort should also be made to collect or renew your overdue paper.

"Please bring this communication to the attention of your board of directors for consideration and for reply over their individual signatures.

"Respectfully yours,

"E. S. LACEY, *Comptroller*."

The last letter was answered by the directors over their own signatures (Exhibit "944," B. of Ex., pp. 63-65):

"To the Hon. Comptroller of the Currency:

"Dear Sir: Referring to your letter of the 16th to Mr. C. W. Mosher, president, we would say in regard to the item of \$50,950.28, E. W. Mosher, that this amount appears on the books to be a loan to him endorsed by C. W. Mosher and secured collaterally by notes of many in-

dividuals in smaller amounts, aggregating the same amount made to E. W. Mosher.

"The facts are that this account is made up with small notes taken in a territory from which comes the best products of the state, and considered a good field for a line of loans, and E. W. Mosher was authorized to get good paper of this character for the bank, and such notes being made in the name of E. W. Mosher.

"The officers of the bank, requiring a guaranty of his discretion, took notes of E. W. Mosher, which have been endorsed by C. W. Mosher, making the notes of smaller amounts collateral, thus making fewer accounts to handle, but unfortunately losing sight of the requirements of Sec. 5200 touching limits of amount which we may simply say ought not to have been done, and the matter has now received the attention of the directors through instructions to place the whole matter in technical as well as financially proper shape as quickly as it may be done without loss.

"The J. W. Small \$51,752.53. This was originally a note given by the Fairfield Exchange Bank of Fairfield, Nebraska, for \$20,250.00, at the time secured by collateral notes. In course of time the loan was found to be weak, and President Mosher took additional security in shape of second mortgage on real estate, a lot of livestock, etc. Mr. Small's bank and his own affairs fell into hard lines and failed in both respects.

"The officers of the bank meanwhile had paid off first mortgages on the real estate to the amount of some \$31,000, to make better the bank security. Other creditors of Small attacked the position of the bank as holding excessive security, which resulted in litigation still unsettled, but through which the claims of this bank against some 2,700 acres of land had been declared a first lien. And it seems certain that the claim will be fully realized, or at farthest only a small loss can follow. The excessive amount of the account comes of erroneously charging the amounts paid for raising liens on the real estate in same account, instead of a special account therefor.

"In regard to overdrafts. Since the examination this matter has had close attention and has been reduced to \$13,537.84 at this date, and should never have been permitted, inasmuch as the records of the bank will show specific instruction to the officers by resolution of the directors not to allow overdrafts.

"Overdue paper. Instructions have been made to the officers to give both close attention and continuous efforts to correct this condition. It will be remembered, however, that the J. W. Small account constitutes a part of this amount, which will hold a considerable sum in that condition until pending litigation is concluded.

"Discount Committee. The bank has always had a discount committee, but about a year since Mr. W. W. Holmes died suddenly and left only one member. The place has now been supplied by the appointment of Mr. E. P. Hamer, the committee now being A. P. S. Stuart and E. P. Hamer.

"Re-discounts. These have been cut down since examination from \$137,234.16 to \$50,844.14, and will probably be reduced considerably the coming three months. This condition was not taken on for purpose of increased business, but to meet falling off in deposits, from which all western banks suffered on account of the drouth of 1890.

"It is the desire of the directors that the standing of this bank should in all respects be upon perfect footing in the department, and will at all times be pleased to have notification of any apparent neglect.

"Yours respectfully,

"C. W. MOSHER, President.

"C. E. YATES, Director.

"R. O. PHILLIPS, Director.

"D. E. THOMPSON, Director.

"A. P. S. STUART, Director.

"E. P. HAMER, Director.

"R. C. OUTCALT, Director."

On September 19th, 1892, the directors wrote another letter to the comptroller which appeared to be in answer to one dated August 31, 1892, which had been lost. The directors' letter is as follows (Exhibit "943," B. of Ex., p. 63):

"Dear Sir: In reply to your favor of August 31, 1892, would state that we fully answered you in February last as regards the Mosher & Small loans, and am now making good progress toward cutting those items down to the limit.

"As regards the real estate mortgages that is a part of the Small matter, and both will be cleaned up at the same time. The *dividend of July 1st was all right*. The expenses since then have exceeded income by reason of having paid taxes and interest on certificates of deposit

to an unexpected amount during July. The item of \$8,000 losses referred to was an estimate of contingent losses and not any particular loss already incurred, but referred to some matter or process of liquidation, all items mentioned by you shall receive prompt attention.

"Yours truly,

"(Signed)

"C. W. MOSHER,

"R. C. OUTCALT, Cashier,

"D. E. THOMPSON,

"E. P. HAMER,

"A. P. S. STUART,

"R. O. PHILLIPS,

"C. E. YATES."

We invite comparison between these letters and the comparative mild admonition contained in the comptroller's letter referred to in the case of *Thomas v. Taylor*. In that case recovery was based squarely upon the fact that after the receipt of such letter "defendants must have proceeded upon some reasonable inquiry and have had some apparently good ground for testing the report as it stood."

Thomas v. Taylor.

These letters informed the directors:

1. Of loans to its own officers and others which exceeded the limit prescribed by law and were in fact violations of law.
2. That the Bank carried overdrafts in violation of law; that the Bank had overdrafts amounting to \$55,004.47 as shown by its books, while it reported only \$12,418.97. Here was direct and specific knowledge that the report contained a false representation in this one item of nearly \$43,000.00. It would seem this was sufficient notice to put ordinarily prudent men upon inquiry.
3. That overdrafts should be avoided; that overdue paper amounting to \$106,760.25 should be collected or renewed and satisfactorily secured.
4. That the Bank had \$14,000.00 in bad debts which should be charged off prior to declaring a dividend.
5. That item of premium on U. S. bonds should be charged off.

6. That the Bank had \$18,500.00 in bad debts which it proposed to charge off before making a dividend—but did in fact never charge off.

7. That the Bank still carried as part of its assets, notes of Donnell, Lawson & Simpson, a firm that had been insolvent and out of existence since May, 1884 (over seven years), the notes purporting to have been executed subsequent to that time.

8. That its expense account exceeded the undivided profits by \$4,830.87 (yet somehow they managed to declare the next regular dividend).

9. That the Bank had large liability on account of notes and bills rediscounted.

10. That the board had only two meetings during the past year and had not examined or approved of the loans and discounts, and

Finally, that the conduct of the Bank's affairs devolved by law upon the board of directors and regular and frequent meetings are very desirable.

We ask, how could a man of ordinary intelligence fail to know the Bank's condition had he paid the least attention to the comptroller's letter? It is no wonder Mr. Thompson said the whole thing was rotten.

In the second letter the comptroller called the attention of the directors:

1. To the excessive loans of E. W. Mosher and G. W. Small.

2. That the Bank had some loans that had been carried along for a number of years,—including the above loans of Mosher and Small,—which should be collected as soon as practicable. This must have referred to the notes of Donnell, Lawson & Simpson, of the various Marsh concerns and perhaps the Western Manufacturing Company.

3. Mr. Mosher's liability as an endorser was too large.

4 That there was an agreement that Outcalt and Mosher should reduce their liability and in future confine overdrafts to those of a temporary nature. And what is more significant, it informed the directors, if indeed they needed such information, that the business of the Bank had suffered by reason of Mosher and Outcalt's conduct of its affairs. Here was specific knowledge that the Bank officers were neglecting its affairs by reason of which the Bank was suffering. Was this not sufficient to open the eyes of the directors? After this information what excuse could they give for continuing their policy of inaction?

5. Attention is again directed to overdrafts prohibited by law amounting to \$60,936.78, and requesting that they should be avoided; also overdue paper amounting to \$104,868.19, which must be collected or renewed with security. The slightest examination of these items would have disclosed the Bank's condition.

6. The bank examiner reported that losses aggregating \$30,000.00 were charged off during the examination. This statement was absolutely untrue for no losses were charged off at this time or at any other time.

Yet in face of this information the directors declared their usual dividend on July 1st following, and in their letter to the comptroller on September 8th, 1892, informed him that "the dividend of July 1st was alright."

7. The directors were criticised because they met but twice a year and then only to go through the form of declaring dividends and did not examine loans and discounts—that they did not have a discount or examining committee. And were again expressly reminded that the conduct of the affairs of the Bank devolved upon its directors.

8. They were again reminded of the Bank's heavy rediscounts and excessive loans, yet in view of all this information the directors declared their usual semi-annual dividend on July 12th, 1892, although they were informed by the comptroller that the bank examiner had charged off \$30,000.00 in

bad debts,—which if true, made it impossible to declare a dividend.

In the directors' letter to the comptroller of February, 1892, they stated that the item of "\$50,950.28, E. W. Mosher" was "made up with small notes taken in territory from which comes the best products of the state" and "E. W. Mosher was authorized to get good paper of this character for the Bank."

And Mr. Thompson testified (B. of Ex., pp. 447-8), this money was sent to E. W. Mosher to loan in York county. The money was sent in large amounts and Mosher's notes taken therefor. He then made loans in smaller amounts taking notes therefor in his own name and endorsing them to the Bank. These loans were not regarded as the primary obligations of E. W. Mosher (B. of Ex., p. 351); he was the agent of the Bank to make these loans "and the Bank was to hold the *primary paper* of the real borrowers," but when the receiver took charge the Bank had, among its assets, notes of E. W. Mosher aggregating \$107,085.45. These were carried as primary obligation and the notes of the *real borrowers* to whom the money had been loaned were also carried as primary obligations and entered as assets of the Bank (Jones, B. of Ex., p. 657; Exhibit "11-A," pp. 659-666; Exhibits "12-A," "13-A," "14-A," "15-A," pp. 667 to 726).

The letter states that "the records of the Bank will show specific instructions to the officers by resolution of the board of directors not to allow overdrafts" when the facts are the reverse (Minutes of January, 1888, meeting, B. of Ex., p. 339); and that "the Bank has always had a discount committee," *when it never had one*.

They said they had cut down re-discounts from \$137,234.16 to \$50,844.14, but when the examiner took charge this item amounted to \$231,359.86.

The directors' letter of September 19, 1892, was apparently in answer to the comptroller's letter of August 31, 1892. The letter could not be found, hence we are not apprised of the nature of the inquiry. The answer, however, says, good progress is being made in cutting Mosher and Small loans down

to the limit. When the bank closed it had the following paper in excess of the lawful limit :

C. W. Mosher.....	\$ 85,281.67
R. C. Outcalt.....	54,146.66
Mosher & Outcalt.....	5,832.00
E. W. Mosher.....	107,085.45
Western Manufacturing Co.	235,000.00

It says "the dividend of July 1st was alright." How was a dividend possible if, as the comptroller's letter states, the examiner charged off \$30,000 in losses during this dividend period?

That the directors were not satisfied with the management of the officers is clearly shown by the letters of Mr. Hamer to the comptroller wherein he says: "The manner of conducting the Capital National Bank of Lincoln, Nebraska, *for a length of time has not been satisfactory to me.* * * * I think I can promise you there will be better management" (B. of Ex., p. 62, Exhibit "942").

The directors, Thompson and Yates, have been fulsome in their denial of knowledge of the Bank's affairs, but they have not explained why in the face of these letters they continued to violate the directions of the comptroller, and deliberately refused to do their duty or how they managed to keep themselves ignorant.

In the face of these explicit instructions of the comptroller, the directors continued to attest reports, and permit the officers of the Bank to issue and publish official reports that were utterly false and untrue.

The Case as to E. P. Hamer.

Mr. Hamer had departed this life prior to the first trial in this case, hence there is no evidence to rebut the presumption that he must have known that the statements of the Bank's condition were false.

That he knew considerable about the Bank's affairs is apparent from his personal letter to the comptroller under date of February 23, 1892, which was as follows (B. of Ex., p. 62, Exhibit "942") :

"Dear Sir: Your letter of Feb. 15-92 received and considered. The manner of conducting the Capital Nat. Bank of Lincoln, Neb., for a length of time has not been satisfactory to me. I have had a talk with C. W. Mosher and R. Outcalt, president and cashier, on the subject, and they promise that the management of the bank shall be improved. I think I can promise you there will be better management. Your letter is a move in the right direction; it indicates that we, the directors, should take a more positive position in the management, which I, for one, shall do.

"Respectfully, etc.,

"E. P. HAMER."

At the trial of these cases the testimony of Mr. Hamer, taken in another case involving practically the same issues was introduced. In that testimony he admitted that he knew of the Western Manufacturing Company paper held by the Bank (B. of Ex., p. 594); and that he was generally familiar with the Bank's affairs is shown by the following:

Q. "When these dividends were declared they were made upon the faith of what Mosher stated to be the condition of the bank, were they not?"

A. "Oh, I couldn't say it was wholly on that he made the statements, but then, as I thought, we had some knowledge of the condition of affairs" (Hamer, B. of Ex., p. 595).

Q. "Did you ever examine at any time all of the bills receivable and all the paper in the bank?"

A. "Well, I supposed so. We thought we were examining them all" (Id., p. 595).

Q. "Did you know there had been a loss through Donnell, Lawson & Sampson?"

A. "Why, I knew something of it, yes."

Q. "Now, did you think it was right, Mr. Hamer, while this Small matter was tied up in litigation, involving some \$50,000.00, from 1886 up to the failure of the bank, in view of this loss or tying up of the capital or money of the bank by reason of the failure of Donnell, Lawson & Simpson in the amount of \$29,000.00, and in view of the losses and tying up of the funds of the bank by the failure of the Sherman County Banking Company, amounting to some twenty odd thousand dollars, and in view of the overdue paper on hand and the

amount outstanding in the hands of collecting agents, and in view of the amount of money that was tied up in this E. W. Mosher business, or that was tied up in lands taken by him, did you think the bank was justified in declaring and paying dividends?

A. "I don't know as I am banker enough to decide just what amount a bank might lose and still declare a dividend. I don't know—" (*Id.*, p. 597).

Q. "I call your attention to two reports made to the comptroller of the currency by the Capital National Bank purporting to have been signed by you, dated September 30, 1892, and September 25, 1891, and I will ask you if you signed those?"

A. "Yes, sir."

Q. "Did you read those over before you signed them?"

A. "Yes, sir."

Q. "Did you verify them by the books of the bank?"

A. "Well, no, not entire."

Q. "Do you know whether those figures that are on here now were on there then, showing the amount of overdue paper, bad debts, and loans in excess of the limit prescribed by law?"

A. "I suppose I knew that those were in excess, and I suppose I knew it when I signed it, but my understanding of that is that it started with a smaller affair and then run up these amounts" (*Hamer, B. of Ex.*, p. 598).

There is not in the entire record one word on behalf of Mr. Hamer to show that he did not know the condition of the Bank's affairs or that he even believed the reports to be true.

As a director it was his duty to actively and actually assist in the management of the Bank and it must be presumed that he did so and that he knew its actual condition.

In any event, if he complied with the directions of the comptroller, he must have had knowledge. After this he could not be ignorant in law. Plaintiffs were required to do no more than to show opportunity for knowledge. From this the presumption of knowledge would follow. The record, however, shows more. It proves that Mr. Hamer was intimately acquainted with the affairs of the Bank.

As to Mr. Yates and Mr. Thompson.

Mr. Yates and Mr. Thompson were present at the trial and testified on their behalf and while they denied actual knowledge of the Bank's condition, their own testimony impeaches the truthfulness of their statements. After the letters of the comptroller and their own answers thereto, it was impossible for them to be ignorant without violating the direct and specific commands of the comptroller.

Their statement that they inquired of the bank examiner, who said the bank was in flourishing condition, is no excuse. The directors and not the examiner are the ones upon whom the duty of management devolves. Besides, the statements are mere hearsay and self-serving declarations, and entitled to no consideration. Such evidence is easily fabricated.

The comptroller's letters were based on the reports of the examiner, criticising the Bank's condition and it is not to be supposed he deliberately misrepresented its condition to the directors,—the very ones, who, above all others, should be expected to know.

C. E. YATES.

In his examination in chief, Mr. Yates said he had nothing whatever to do with the affairs of the Bank and had no knowledge of its condition, but when confronted with his testimony in another case, he was compelled to confess knowledge of facts which if pursued must have brought knowledge of the Bank's condition.

He joined with the directors in their letters to the comptroller, yet denies knowledge of everything contained in those letters, although he was present at the directors' meeting in February, 1892, when the comptroller's letters and the directors' answers thereto were discussed (B. of Ex., p. 344).

If he did see the comptroller's letter or joined in the answers of the directors, how can he say he was ignorant of the Bank's affairs? How could he be and obey the directions of the comptroller?

There is not a word from Mr. Yates as to why he violated the express directions of the comptroller or his duty as a director; why he made no effort to acquaint himself with the Bank's condition or why he persistently refrained from participating in the conduct of its affairs.

There is not a word of explanation of why in the face of all these facts he signed the statement of December, 1892—the month preceding the failure. This of itself is sufficient to establish his liability.

He says he knew nothing of the Donnell, Lawson and Simpson paper or the notes of the Marsh companies, although the comptroller's letters call specific attention to them.

He says he knew nothing about York county loans made to E. W. Mosher nor the loans to J. W. Small (B. of Ex., p. 556), while the comptroller's letters make specific mention of them and the directors' reply attempts to explain them in detail.

He says he knew nothing of the loans to Mosher and Outcalt and "would have raised a row" had he known it, yet the comptroller's letters direct specific attention to these loans as being excessive (B. of Ex., p. 555).

He says he didn't know the bank had any real estate or overdrafts or re-discounts, when the comptroller's letter challenged attention and gave direction with reference to them (B. of Ex., p. 577).

He denied knowledge of any loans to E. W. Mosher, although these were also referred to in the comptroller's letters (B. of Ex., p. 579).

When confronted with his testimony in another case he admitted he knew the Bank had some bad debts which were charged off prior to 1892 (B. of Ex., pp. 577-8); that the bank examiner, Griffith, told him Mosher hadn't been attending to business very close (B. of Ex., pp. 578-80); that the undivided profit account had been wiped off (B. of Ex., p. 580); and part of the Bank's six months paper had been cancelled (B. of Ex., p. 580); and there would be no dividend declared in December, 1892 (B. of Ex., p. 580); yet with all this knowledge he signed the statement which was published December 17, 1892.

MR. THOMPSON.

The evidence against Mr. Thompson is even more convincing than in the cases of Mr. Hamer and Mr. Yates. Not only is there direct evidence of knowledge, but there is such a mass of circumstances in support of it that only one conclusion is possible. We have never doubted that Mr. Thompson knew of the Bank's condition long before it closed its doors and that when the end was in sight he assisted in making away with what few assets remained. We submit in all candor that an impartial examination of the evidence in this case will justify our contention.

Let us review some of the facts and circumstances disclosed by the record.

On September 8, 1891, the comptroller of the currency wrote a letter which we have elsewhere set out in full. This calls specific attention to the fact that notes of Donnell, Lawson & Simpson were still being carried as assets of the bank. Mr. Thompson knew when he became a stockholder and director in June, 1884, that this firm had failed and that its account was worthless, for that very matter was discussed at the first meeting of the directors after it became the Capital National Bank (B. of Ex., pp. 430, 512-3, 529). Was it not a circumstance of suspicion that seven years later this paper should still be carried as an asset of the bank, especially when the paper was dated long subsequent to the failure of that firm (B. of Ex., pp. 189-90)?

The comptroller's letter of criticism was based upon the report of the bank examiner made shortly after the official report of July 9, 1891, which had been signed by Mr. Thompson, and calls specific attention to the fact that the official report misrepresented the item of overdrafts in the sum of nearly \$43,000. The comptroller's letter also called attention to other matters of serious concern to the bank, to which we have already referred.

Shortly after the receipt of this letter there was a meeting of the directors at which the comptroller's letter was discussed. At this meeting Mr. Mosher and Mr. Thompson had

a quarrel about the "letter they had got from the comptroller," and Mr. Thompson stated to Mr. Mosher "that he thought the whole thing was rotten right through and he was going to get out of it" (Scott, B. of Ex., p. 353).

Mr. Thompson did get out shortly thereafter. He says it was on November 14, 1891, but the circumstances indicate it was an earlier period. The certificate for Mr. Thompson's stock which he claims to have sold to Mosher and Outcalt was for 180 shares and evidenced by certificate No. 137. The stub of the certificate of stock book so indicates. But it appears by the stock book that certificate No. 127 was issued December 17, 1891, and there remained in the stock book following stub No. 127, but preceding stub No. 137, seven certificates which were unused and had not been detached from the stubs. There could have been no purpose in this other than to show certificate No. 137 to have been issued at a later date than it actually was (B. of Ex., pp. 731-2).

Mr. Thompson took in payment of this stock the note of Mr. Mosher and Outcalt bearing six per cent interest when the stock had been earning twelve per cent annual dividends. He says that the sole reason for selling his stock was that in coming from Chicago he saw Mosher on a sleeper with a woman whom he recognized as a woman of the town (B. of Ex., pp. 443-4, 491-2).

His episode with Mosher was the reason he insisted on getting out of the Capital National Bank (B. of Ex., pp. 491-2).

According to Mr. Thompson's own testimony his connection with the affairs of the Capital National Bank was merely perfunctory. He did not participate in the direction of its affairs and all he claims to have done was to attend some of the meetings when dividends were declared.

In the Gas Company in which Mosher and Outcalt owned about 4,000 shares and Mr. Thompson but 200 out of a total of 5,000 (B. of Ex., pp. 538, 542), Mr. Thompson retained his stock (B. of Ex., p. 491) and accumulated more as he could get it (Honeywell, B. of Ex., p. 538). In this company Mr. Thompson continued as president, Mosher as vice-president

and Outcalt as treasurer (B. of Ex., pp. 537-9). This was during the period when large amounts of money were being expended by the Gas Company in the reconstruction of its plant and Mosher and Thompson were the ones who financed the enterprise (Honeywell, B. of Ex., p. 538 *et seq.*).

In the insurance company in which Mr. Mosher owned more stock than Mr. Thompson, Mr. Mosher continued as treasurer and Mr. Thompson as president (B. of Ex., p. 491). Both of these enterprises were operated and controlled almost entirely by Mr. Mosher and Mr. Thompson and necessitated closer and more intimate relations than the affairs of the bank. If it were solely on account of Mr. Mosher's degeneracy that Thompson sold the bank stock, why did not this same fact influence his holdings in the other companies?

Furthermore, Mr. Thompson did not dispose of all his stock in the bank; he retained 10 shares,—just enough to permit him to continue as a director. And he continued as such until the Bank failed (B. of Ex., pp. 443-4). It must be apparent that so long as he continued as a director his duties required him to continue his relations with Mosher just as before. Those duties arose by reason of being a director and were not dependent upon the amount of stock. It is thus apparent that the sale of the 180 shares failed to accomplish the very purpose for which he claims it was made.

It did not affect his relation to the Bank nor relieve him of his duty as director, nor of the necessity of continuing his associations with the immoral Mosher.

Mr. Thompson's fellow directors did not know of the sale of the stock (Yates, B. of Ex., p. 572). And to all outward appearances his interest and participation in the Bank's affairs was the same as before. Why should the transaction have been kept from the knowledge of his fellow-directors?

Just a few days before the bank failed, Mr. Mosher introduced Mr. Thompson to Mr. Dobson, president of the First Bank of Ulysses, at the Capital National Bank as "one of his principal stockholders" (B. of Ex., pp. 656-7).

It is apparent that Mr. Thompson's purpose was to rid himself of something that would in all probability develop to be a liability instead of an asset. By retaining but the ten shares he reduced his liability to assessment to \$1,000.00 and he thought that by thereafter refraining from signing reports he would be free from further liability, but continued to let the Bank use his name (B. of Ex., p. 444).

In payment of his bank stock he took the note of Mosher and Outcalt. He thought they were very wealthy and would have been willing, he says, to have taken their notes unsecured for several times that amount, but in this case he took Gas stock as collateral security (B. of Ex., pp. 492, 497).

He says the collateral security was unsolicited on his part, but was proffered by Mosher (B. of Ex., p. 492), (although at one time he forgot himself and said they "had to give something as security" [B. of Ex., p. 504]). We know now that the Bank was then hopelessly insolvent. We have shown that up to July 1, 1891, the Bank had sustained losses aggregating upwards of \$800,000.00, and that Mosher knew its actual condition will not be questioned. Is it reasonable to suppose that knowing his own insolvency, Mosher would deprive himself of valuable assets which he could easily convert into money and voluntarily gave them to the man who had charged him with immorality, refused to associate with him and practically forced the purchase of the stock?

When after the bank's failure the Gas Company was sold, Mr. Thompson owned over \$100,000.00 of its stock (B. of Ex., p. 482). How much above that he owned he would not inform us nor were we advised how he got it.

He joined in both of the directors' letters to the comptroller. And that he was conversant with the contents of those letters is shown by his own evidence. He says he knew the character of the dealings between E. W. Mosher and the Capital National Bank (B. of Ex., pp. 470-1), and explains that the Mosher notes evidence money that was loaned in York county on real estate security; that Mosher was in a sense the agent

of the bank (B. of Ex., pp. 447-8, 470-1); that these real estate mortgages were the primary obligations and the Mosher notes were taken as a convenient method of handling the business.

But the fact is that the Mosher notes were carried as assets of the bank and so were the loans which were made with this money. Here was a plain duplication of assets. The record shows that loans so made in York county, aggregating \$720,918.34 (B. of Ex., p. 726), actually entered into and became a part of the assets of the bank and were carried as such (B. of Ex., pp. 657-8 to 726); at the same time the Mosher notes were also being carried by the bank as assets.

That Mr. Thompson was actively and intimately connected with the bank's affairs is further shown by the fact that on October 21, 1892, he wrote a personal letter to the comptroller of the currency (B. of Ex., p. 599). The directors' meeting of February 20, 1892, at which the comptroller's letter was discussed, was held at the Burr block (B. of Ex., p. 596), where Mr. Thompson had his office (B. of Ex., pp. 455, 505), "a block away from the Capital National Bank."

In December following this letter (the month before the Bank failed) Mr. Thompson exchanged his gas stock collateral for deeds to real estate in York, Hamilton and Lancaster counties. Mr. Thompson testified these deeds were brought to him previously executed by Mosher and Outcalt and their wives without any knowledge beforehand on the part of Mr. Thompson that they were to be given (B. of Ex., pp. 488, 499, 500). Is it reasonable to assume that Mr. Mosher would have had all these deeds prepared and executed without some previous assurance that the exchange of securities would be acceptable? Later on, after Mosher had opportunity to sell some of this real estate, he would, without prior arrangements, bring to Mr. Thompson deeds of other lands and procure reconveyance of lands previously deeded to Mr. Thompson. They were transactions as would occur only between men whose relations were most intimate.

With these deeds came a bill of sale of all of Mr. Outcalt's personal property (which was in fact a mortgage, B. of Ex., pp. 502-8-9), at the Lancaster farm and a chattel mortgage on every particle of personal property contained in Mr. Mosher's home, described in the very minutest detail (B. of Ex., p. 733, Exhibit "1060"; B. of Ex., p. 735, Exhibit "1059").

The real estate in reality belonged to the bank and had been obtained through real estate mortgages taken for the Bank in the E. W. Mosher loan transactions (Sanford, B. of Ex., pp. 424-8).

This must have been known to the directors, for some of the real estate that was conveyed to Mr. Thompson was described and listed in the Bank's report to the comptroller under date of December, 9, 1892, as being a part of the bank's assets (B. of Ex., p. 346, folio 1096, sheet 1).

Mr. Thompson testified (B. of Ex., p. 502) that he or Mr. Mullen, his secretary, had the deeds filed for record, but the truth is that, at least as to four deeds, they were sent for record to Hamilton county by Mr. Sanford, an employee of the Capital National Bank. The recording fees were paid by Mr. Sanford and the deeds returned to him (B. of Ex., pp. 749-50).

Why should Mr. Sanford have paid the recording fees? Why were the deeds sent for record by the Bank and again returned to the Bank's employee? Does this not indicate a close relationship between the parties?

These instruments were filed January 19, 1893, just two days before the bank failed (B. of Ex., pp. 749-51).

Mr. Thompson says he was in Terre Haute, Indiana, when the bank failed, and testified at the former trial of this case, that both the bill of sale and chattel mortgage were delivered to his secretary, Mr. Mullen, and by him filed for record during Mr. Thompson's absence in Indiana and without his knowledge; that he had no knowledge of the bill of sale until he returned from Terre Haute (B. of Ex., p. 517), and was very

much displeased to learn of it when he returned (B. of Ex., pp. 518-9). But at the last trial he was confronted with his answer in a garnishee proceedings (taken about a month after the failure of the Capital National Bank), wherein he admitted that the bill of sale was delivered to him with a deed to Outcalt's farm in December, 1892 (B. of Ex., pp. 498-9), and that he agreed to withhold it from the records (B. of Ex., p. 503), and called Mr. Mullen's attention to the fact that the date had been omitted (B. of Ex., p. 519). This date was supplied before the instrument went on record, hence the instrument must have been delivered before Mr. Thompson left for Indiana.

The bank closed its doors on Saturday, January 21, 1893, at 1 o'clock P. M. The Mosher and Outcalt chattel mortgages were filed for record early on Monday morning following, by Mr. Mullen, with the request that they be kept from the public, copied into the regular register and the originals returned (B. of Ex., pp. 635-6); about 30 minutes later Mr. Dorgan filed a duplicate of the Mosher mortgage (B. of Ex., p. 636). When informed that Mr. Mullen had already filed such an instrument Mr. Dorgan remarked that he was obeying orders (B. of Ex., p. 636). Upon whose authority these instruments were filed was not disclosed by the evidence, but that both instruments had been prepared a long time previous to their filing was evident by an inspection of the instrument as was shown by the county clerk's testimony (B. of Ex., pp. 634-6, 638). The dates of the instruments had been left blank and had the appearance of having been inserted shortly before their filing.

The Mosher mortgage contained from 150 to 200 separate and distinct articles, specifically enumerated, and no doubt required considerable time in its preparation. It is very improbable that Mr. Mosher could have found time on the Sunday on which the Bank went into the hands of the bank examiner to have these mortgages prepared. And if they were prepared at a previous time, Mr. Thompson certainly knew of it, for he was still in Lincoln at 2 P. M. of the day preceding.

At the former trial in these cases Mr. Thompson testified that he left Lincoln for Terre Haute on Tuesday or Wednesday before the bank failed, or even a day or two earlier, but at this trial when again confronted with his answer in the garnishee proceedings he was forced to admit that he did not leave Lincoln until Saturday, January 21, at 2 o'clock, P. M., an hour after the bank had closed its doors never again to open (B. of Ex., pp. 476, 517).

We do not wish to burden the court with a detailed recital of the evidence, but a careful examination will leave no doubt that both of these instruments were in Mr. Thompson's possession for more than a month prior to the Bank's failure. Mr. Mullen, to whom it is claimed these instruments were delivered, was present throughout the trial, but was not put on the stand to tell when or how they came to him. This was a circumstance the trial court was justified in taking into consideration.

Mr. Thompson concedes it would have aroused his suspicion to have taken a chattel mortgage on Mr. Mosher's household goods (B. of Ex., pp. 496-7), or the bill of sale of Outcalt's chattels—if it had come to him,—for both Mosher and Outcalt were supposed to be very wealthy men (B. of Ex., p. 434). He endeavors to convey the impression that these instruments might have been delivered to Mr. Mullen but the evidence conclusively shows that the transactions were had between Mr. Thompson and Mosher in person (B. of Ex., pp. 499 to 500), including the agreement not to put on record (B. of Ex., p. 503).

At the former trial Mr. Thompson testified that the Mosher chattel mortgage came to him when it became evident the bank was going to fail (B. of Ex., p. 518) and that the bill of sale of Outcalt's horses, hay, sulkies and horse boots was taken at the same time (B. of Ex., p. 519), yet he says that a man could not be more astonished over anything than he was when he was advised of the Bank's failure (B. of Ex., pp. 441-2), although the Bank was closed before he left Lincoln. Being forced to admit he received the Outcalt bill of sale in Decem-

ber, 1892 (B. of Ex., pp. 497 to 500), he attempted to avoid its effect as a circumstance of suspicion (taking such security from a man of Outcalt's reputed wealth [B. of Ex., p. 497]), by saying this property "belonged to the farm and wouldn't be worth a rap without the farm, or one without the other" (B. of Ex., pp. 497, 528). It is not apparent how trotting bred horses (B. of Ex., p. 503), hay, sulkies, harness and horse boots, could be considered part of the land and be of no value without it. Or, why the land would be without value if separated from the chattels.

The absurdity of this statement is shown by the fact that he sold the chattels (B. of Ex., p. 529) while he retained the land for 10 or 12 years (B. of Ex., p. 501).

Shortly after his return to Lincoln (on January 26, 1893), Mr. Thompson published a letter in the *State Journal* attempting to exonerate himself from blame in connection with the Bank's failure (B. of Ex., pp. 483-5). (Strange he should find it necessary to defend himself. "The wicked flee when no man pursueth." In it he admits the chattel security was given to him with the deed to the stock farm *some weeks prior* to the Bank's failure.

As to the Mosher mortgage, he says it was given without his solicitation or knowledge beforehand, but does not say when. He says it was given to secure \$2,000.00 in stock which Mr. Mosher held in trust for Mr. Thompson's daughter, Laura, and was obliged to return "or its equivalent" (B. of Ex., pp. 545-6), and so the mortgage recited (Exhibit "1060," B. of Ex., p. 735). It was conditioned that Mr. Mosher, who held this stock in trust for Mr. Thompson, should pay the dividends to Mr. Thompson's daughter until she arrived at the age of 18 and that thereupon he should return the stock or its par value of \$2,000.00 to Mr. Thompson, at the latter's election; thus making Mr. Mosher a guarantor of the value of the stock. It provided that Mr. Thompson might sell the chattels and pay himself the sum of \$2,000.00.

The fact is, *no such obligation was imposed upon Mr. Mosher by the trust arrangement.* At the last trial the orig

inal stock certificate, with the trust agreement endorsed, was introduced in evidence (Exhibit "A-17," B. of Ex., p. 730). This conclusively shows Mosher to have been a mere naked trustee; that there was no such obligation imposed upon him and plainly indicates that the chattel mortgage was made for a fraudulent purpose.

The \$2,000.00 stock was actually owned by Mr. Thompson but by means of this chattel mortgage he evidently made the Bank's receiver believe it belonged to Mosher and in that way escaped paying assessment on it—which he should have paid (B. of Ex., p. 516).

As soon as Mr. Thompson reached Terre Haute he received a telegram from Lincoln informing him of the bank's failure. He immediately started for Lincoln and on his way wired Mr. Mansfield, Mr. Mosher's father-in-law, who resided in Peoria, to meet him (B. of Ex., p. 474). Why did he think Mr. Mansfield would be interested? With no information except that the bank had failed, why did he apparently attach blame to Mr. Mosher and seek his father-in-law to assist in the matter?

He reached Lincoln early in the morning and was at once called to Mosher's home and Mr. Mosher confessed that all Mr. Thompson had heard about his criminal conduct was true and that he wanted to go to the penitentiary as quick as he could get there (B. of Ex., p. 442). At the directors' meeting of January 22, 1893, Mosher said the bank was "completely busted" (B. of Ex., p. 565).

Yet Mr. Thompson professed to have confidence in its solvency and to have advised his friends not to adjust their claims against the bank for 75 per cent.

Mr. Thompson was active in trying to help Mosher in his troubles.

After Mr. Mosher was arrested Mr. Thompson called on him in the jail in which he was confined and there received an order to pay Mrs. Mosher the dividends on certain Gas stock which had been pledged to creditors. In order to assist Mosher in keeping the dividends from garnishing creditors Mr.

Thompson secretly placed the money in a safety deposit vault and had the books of the Gas Company indicate they had been paid, when in fact Mr. Thompson actually had the money in his possession (B. of Ex., pp. 479-481). These dividends properly belonged to the pledgees of the stock (B. of Ex., pp. 525, 529).

This fund was in controversy in *F. & M. National Bank v. Mosher et al.*, 68 Neb. 724, where it was sought to be reached by garnishment against the Gas Company and Mr. Thompson. The Gas Company by Mr. Thompson contended the stock was claimed by other parties. The plaintiff alleged the claims were fictitious and fraudulent, and actually made in the interest of Mosher; and asked that the Gas Company be required to show who the real claimants were. The Gas Company did not disclose and plaintiff's request to obtain that information was objected to and sustained by the trial court—a palpable error. Plaintiff mistook its remedy by appealing to the supreme court instead of prosecuting error, and that tribunal decided that it was powerless to afford relief.

The anomaly of the situation was that the creditor was denied the fund because the stock was pledged to third parties, yet neither creditor nor pledgee got the money.

Mr. Thompson appears to have been very much elated over his success in manipulating this fund for his immoral friend Mosher. When interrogated as to where he kept the fund he said:

"If you had been smart enough you could have gotten this on garnishment most any time. This money has lain there since July, 1895; * * * and if you folks had been as cunning about that as about other things you might have gotten that money" (B. of Ex., p. 480).

By means of this manipulation the creditors were defrauded out of upwards of \$8,000.00.

Mr. Thompson points to his personal losses as evidence of his good faith, but it appears that on Jan. 6, 1893, he had on deposit \$2,090.30 and on January 21, when the bank failed, he had on deposit 51c (B. of Ex., p. 730).

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As to the Gas Company's deposit, Mr. Thompson's holdings were so small that his share of the losses were trivial. Mosher and Outcalt owned fully four-fifths of the stock, while Mr. Thompson owned but one-twenty-fifth, and it is absurd to pretend that the latter had absolute control over the account when Outcalt was treasurer. Moreover, in the circumstance it would have aroused suspicion to transfer this account to a competitor bank, and it was not such an account as could be plausibly placed in a savings bank. Mr. Jones testified this account received a credit of \$10,000.00 growing out of the fraudulent certificate of deposit for \$100,250.00 issued in the name of J. E. Hill, treasurer (B. of Ex., p. 201). The account of the Aurora State Bank of Aurora, Nebraska (about 75 miles west of Lincoln), in which Mr. Thompson was a small stockholder, was in a similar situation. He could not have advised its officers to transfer or withdraw its funds without betraying knowledge of the conditions that prompted the act.

In the Insurance Company Mr. Thompson owned 25 per cent of the stock, and observe how this account was handled.

On the morning of January 21, 1893, the day the bank failed, the Insurance Company had on deposit with the Capital National Bank \$10,482.49. Before 1 o'clock of that day three checks aggregating \$9,082.65 were charged to that account (B. of Ex., p. 729). Mr. Thompson claimed at the former trial he was absent when this was done, but at the last trial, being compelled to confess his presence, he attempted to explain the transaction by showing that these checks were given to three savings banks in Lincoln to deposit on interest, and that the reason was that the savings banks were paying 5 per cent interest, and would pay the money at any time by the depositor losing his interest (B. of Ex., p. 490). But he evidently forgot that the Capital National Bank was at that very time paying 6 per cent interest on deposits on the same terms (B. of Ex., p. 540; Orig. Bill, p. 1230).

One of these checks was cashed. The other two, aggregating \$6,000, were merely credited to the accounts of the payees on

the books of the bank. When Mr. Thompson returned from Terre Haute he found the \$6,000 had not been withdrawn, and he says he reimbursed the payees because he thought it was the right thing to do. No doubt he did it because he knew the exposure a suit might bring, and now attempts to make virtue out of necessity. His action in checking out this account on the day the bank closed shows his intimate knowledge of the situation. He evidently left the state to avoid suspicion. The fact that the two payees did not withdraw the funds at once was a misfortune he could hardly guard against. A hint to them would have indicated knowledge of the coming crash.

That Mr. Thompson was intimately acquainted with the bank's affairs during the last year of its existence can not be doubted (B. of Ex., Exhibit "AU," pp. 599, 656-7). That he knew of the published official reports is conclusively presumed, and in fact he does not deny it.

An impartial examination of the record compels the conclusion that Mr. Thompson knew the condition of affairs and thought he was avoiding liability by refraining from attesting reports. This theory is further supported by the fact that while he was superintendent of the railroad company, and away from home a large portion of the time, he attested reports frequently, but after he severed his connection with the railroad and took charge of the Gas Company and the Insurance Company, which kept him in Lincoln, and in close association with Mosher and Outcalt, he attested none.

The case of *Stuart v. Hayden*, 169 U. S. 1, 18 Sup. Ct. Rep. 274, is in some respects similar to these. It was an action by Hayden as receiver of the *Capital National Bank v. Stuart*, a stockholder and director, to enforce his individual liability as shareholder under sections 5151 and 5234, Rev. Stat. U. S. Mr. Stuart and the defendants herein became directors of the bank at the same time (1884), so that the controversy grew out of the same bank's affairs, and involved matters within the same period covered by these actions. The appellant Stuart is the same person who, with Mr. Hamer, comprised the so-called "Finance Committee." Mr. Stuart had transferred his

stock in the bank to Gruetter and Joers in December, 1892, in exchange for real estate, and the issue was, if, notwithstanding such transfer, he was liable to assessment. The lower court decided he was, and this court affirmed the decree.

The question of knowledge of the bank's insolvency was a material factor. On this point Mr. Stuart testified that "Far from knowing at the time that the bank was insolvent, he believed it to be solvent, and able to meet its liabilities of every kind." The evidence of other witnesses, however, disclosed that he "for some time previous to the sale of his stock had been dissatisfied with the conduct of Mosher, the president of the bank" (just as Mr. Hamer in his letter of February 23, 1892, complains to the comptroller [B. of Ex., p. 62]); "that he had received an 'intimation' that the next general dividend would be passed" (just as Mr. Yates had received a similar "intimation" [B. of Ex., p. 580]). (In fact the comptroller's letter of February 16, 1892, says the examiner charged off losses aggregating \$30,000 on January 26 preceding, and it would seem this was sufficient "intimation" that a dividend in July would be impossible); that he "had information that a large amount of the bank's money was 'locked up' in real estate, and invested in worthless securities" (just as the defendants here knew, as we have heretofore shown).

After reviewing the evidence this court decided that "the circuit court was justified by the evidence in finding that Stuart, with knowledge of the insolvency of the bank, or, at all events, with such knowledge as reasonably justified the belief that insolvency existed or was impending," sold and transferred his stock.

It is impossible to believe that any of the directors were ignorant of its precarious condition for nearly a year prior to its failure.

In the Stuart case, it was urged that the evidence of knowledge on his part was negatived by the fact that he and his wife each had \$1,250.00 on deposit in the bank when it closed its doors, but Mr. Justice Harlan very aptly remarked that

this may be accounted for by the fact "that he did not expect the bank to fail so soon."

The same condition may have existed as to Yates and Hamer, but Mr. Thompson no doubt knew the end had come before he departed for Terre Haute.

"Fraud is commonly deeply hid away. Often it can only be got at by inference. It is scarcely ever proved by admission, for it blows no trumpets. One can not put his finger on it and say: Lo, here it is, papable to the touch. But it is got at by following its tracks from results back to the inception of the affairs, or from the inception of the affairs forward to the results. To that end, courts are full of solicitude and look with a jealous and anxious eye. Therefore, they permit a minute search and a wide one in pursuit of fraud, for it may now and then be seen through a small crevice, and seemingly indifferent things, without sinister significance when taken separately, may, when properly dovetailed together, establish fraud."

Black v. Epstein, 221 Mo. 286.

Evidence of fraud not only preponderates but is established beyond a reasonable doubt. No stronger proof would be required in a criminal action.

The trial court certainly applied the rule of liability prescribed by the Federal Statutes, and its findings are sustained by the evidence. No other conclusion was possible. It was confronted by the witnesses and best able to judge their credibility.

Indeed, on the question of knowledge the opinion of Hamer, J., is not in conflict—for it concedes, "that for a *considerable length of time before the bank was closed* by the comptroller he (Mr. Thompson) had some *knowledge* that its *financial condition was questioned*." The court escaped the right conclusion by adopting an erroneous test of liability. An examination of the majority opinions discloses that they do not disturb the trial court's findings of fact, as such, but differ as to the legal effect of the evidence.

The opinion of Sedgewick, J., rightly concludes that it is useless to discuss the evidence "in view of the total inadequacy of the opinion (of Hamer, J.), and concurring opinion

to discuss or even state the questions of law upon which this decision depends." Having entirely misconceived the law applicable to the case, the conclusion as to the legal effect of the evidence was necessarily erroneous.

It is almost unbelievable that a national bank could maintain its existence for nearly ten years and be in such utter insolvent condition. No matter how dishonest its officers, its condition could not escape director's knowledge without the grossest of negligence and wanton recklessness. It is impossible to imagine how their conduct could be worse in this respect, and after their attention was directed to the matter and their course of duty pointed out to them we are at a loss to know what could be said in their defense.

Directors' standing in the community is depended on to bring prosperity to the bank and they ought not to be permitted to receive the benefits of that situation without living up to its responsibilities. If they may act as mere dummies, as decoys to lure confiding customers,—and if the conduct disclosed by the record does not constitute a violation of duty,—then the national bank act is a mockery and a sham.

If directors are not bound to preserve and exercise "their functions and authority" how can they "save the banks from disaster and the public who deal with them and support them from deception."

The plaintiffs in these cases have been wholly without fault and "it would be a matter of just reproach if the law were so impotent as to afford no redress."

We respectfully submit the decision of the supreme court of Nebraska ought to be reversed and the judgments of the district court affirmed.

Respectfully submitted,

JOHN JACOB THOMAS,

LIONEL C. BURR,

Counsel for Plaintiff in Error.

Seward, Nebraska, March 4, 1915.

APR 5 1915

JAMES O. MAHER

CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 163

JONES NATIONAL BANK, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES ET AL.

No. 164

BANK OF STAPLEHURST, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES ET AL.

No. 165

UTICA BANK, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES ET AL.

No. 166

THOMAS BAILEY, PLAINTIFF IN ERROR,

vs.

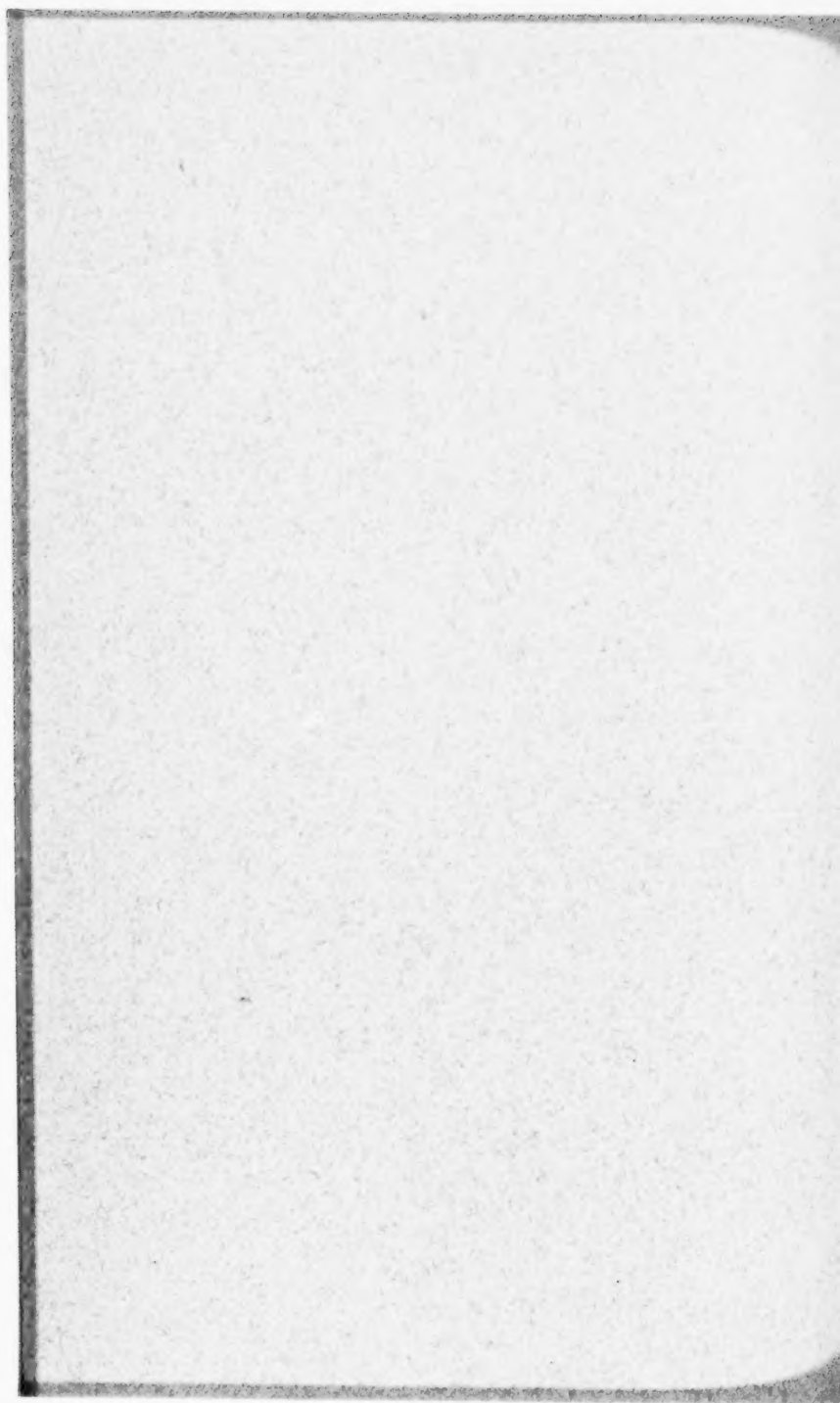
CHARLES E. YATES ET AL.

ERROR TO THE SUPREME COURT OF NEBRASKA.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

J. J. THOMAS,
L. C. BURR, AND
A. B. HAYES,

Attorneys for Plaintiffs in Error.



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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 501.

JONES NATIONAL BANK, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES, D. E. THOMPSON, LOUISA
HAMER, ADMINISTRATRIX OF ESTATE OF ELLIS P.
HAMER, DECEASED, DEFENDANTS IN ERROR.

No. 502.

BANK OF STAPLEHURST, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES, D. E. THOMPSON, LOUISA
HAMER, ADMINISTRATRIX OF ESTATE OF ELLIS P.
HAMER, DECEASED, DEFENDANTS IN ERROR.

No. 503.

UTICA BANK, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES, D. E. THOMPSON, LOUISA
HAMER, ADMINISTRATRIX OF ESTATE OF ELLIS P.
HAMER, DECEASED, DEFENDANTS IN ERROR.

No. 504.

THOMAS BAILEY, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES, D. E. THOMPSON, LOUISA
HAMER, ADMINISTRATRIX OF ESTATE OF ELLIS P.
HAMER, DECEASED, DEFENDANTS IN ERROR.

ERROR TO THE SUPREME COURT OF NEBRASKA.

REPLY BRIEF OF PLAINTIFFS IN ERROR.

The short time that has elapsed since the service of voluminous briefs of defendants in error makes it impossible to review them fully. We are, therefore, compelled to limit our discussion to a few points of the new matter suggested therein.

Sufficiency of the Printed Record.

The contention that this court should not examine the evidence because all of it is not contained in the printed record is without merit. The petitions allege, in substance, (1) that the Capital National Bank was insolvent; (2) that defendants knowingly represented it to be solvent; (3) that plaintiffs saw the statements; (4) that they believed them to be true, and (5) relying upon them, deposited their money in the bank and lost it.

The trial court's findings on all these issues were for the plaintiffs in error, and the State Supreme Court's decisions conceded their correctness, except as to the sufficiency of the evidence to sustain the charge of *scienter*.

Our understanding of the rules of this court on the matter of printing is that they were designed to shorten the record and lessen the labor of the court by printing only such portions of the bill of exceptions as is necessary to a determination of the errors assigned and relied upon. Acting upon this assumption, we designated such parts only as we deemed necessary for that purpose. These designations were duly served on defendants in error, and they, with knowledge of the questions raised in our assignments of error, designated such additional parts for printing as to them seemed necessary. As a matter of fact, it does contain all the evidence that bears upon the question at issue. De-

fendants do not point out any omitted evidence but desire this court to assume such to be the case because slight portions of a very voluminous record are not printed—when they know nothing pertinent to the issues has been omitted.

In the circumstances, we believe the language of Mr. Chief Justice Fuller, in *Walston vs. Nevin*, 128 U. S., 578; 9 Sup. Ct., 192, applicable:

"But we only require the printing of so much of the record as will enable us to act understandingly without referring to the transcript; and if, in the judgment of counsel opposing the motions, more in that respect was needed, he might have made such specific reference thereto as would have enabled counsel for the moving parties to have supplied it. As the cases stand, we have apparently been furnished with quite enough for the disposition of the question involved."

The authorities referred to by defendants in error do not support their contentions. The one nearest in point is *U. S. vs. Cooper*, 185 U. S., 495; 22 Sup. Ct., 761, which holds that a judgment will not be reversed on the ground that there is absolutely no evidence to sustain it where the *bill of exceptions* does not show that the evidence contained therein is all the evidence that was given on the trial, but that is not our case. The bill of exceptions in these cases does show affirmatively that it contains all the evidence that was given on the trial (Original bill of exceptions, pages 1889, —), and that we have printed all of the record pertaining to the point at issue is not denied.

The point is made, that there is no stipulation that the printed record contains all the evidence. But, we submit, when defendants were served with designations for printing, in which we indicated the evidence we deemed necessary for the consideration of the errors assigned, and, in response thereto, defendants designated for printing such additional parts as they deemed necessary for that purpose, that this is equivalent to a stipulation that the printed record,

as thus designated, contains all the evidence necessary to enable this court "to act understandingly without referring to the transcript." To print portions of the record not necessary to the consideration of errors assigned and relied on, would serve no purpose. It would only encumber the record and increase the labor of the court. Moreover, defendants in error are not in position to raise that question at this time. Having had opportunity to designate additional parts for printing, and having availed themselves of this opportunity, they have conceded that the court has been furnished with quite enough of the evidence for the disposition of the question involved, namely, Is the evidence sufficient to establish a *scienter*?

The rules of this court provide (Rule 10, sec. 9) that plaintiff in error may within ninety days designate for printing such parts of the record as he thinks necessary for the consideration of the errors on which he intends to rely, and the defendants in error may within ninety days thereafter designate such additional parts as he thinks material. The assignments of error disclose that a decision of these cases necessitates an examination of the evidence. The defendants knew this when they designated additional parts for printing, and the court may rest assured nothing pertinent to the issues has been omitted.

However, should our view of the situation be erroneous, having in good faith printed all that portion of the bill of exceptions which is at all pertinent to the issues and which the court would in any event examine, we ask that we may be permitted to print the remainder of the record on such terms as the court may deem just to impose, in the event the court shall desire the entire record printed. We assure the court, however, that it will be a needless expense, as no reference will ever be made to it in the disposition of these cases.

The Findings of the State Supreme Court Are Subject to Review.

On page 23 of Mr. Thompson's brief it is said:

"Under the State constitution the concurrence of four judges is necessary in order to pronounce a decision. No point maintained in the opinion of Hamer, J., therefore, became the decision of the court, except the single one concurred in by Letton, J.,
* * *"

"What was that concurrence?"

"That under the holdings of the Supreme Court of the United States, as to the measure of duty and of liability of directors under the banking laws of the United States, I think the case has not been made" (Jones Trans., pg. 55).

But how is it to be ascertained what standard of duty or test of liability he applied, or if they were in harmony with the mandate and decision of this court?

That he misconceived the decision of this court, a mere reading of the opinion will disclose. That he afterwards saw his error and tried to rectify the wrong by voting to grant a rehearing, does not remove the error from the opinion so long as the judgment of reversal is based upon it.

If we assume he concurred in the reasoning of Hamer, J., it does not aid defendants, for that opinion falls by the weight of its own obviously erroneous statements.

Defendant Thompson (Brief, pg. 26) impliedly concedes the existence of what it chooses to call "inaccuracies of expression found in the opinions of the State court," but seeks to brush them aside by saying they are pointless "unless it can be demonstrated that the basic finding of fact which controls the judgment is wrong," by which is doubtless meant that the conclusion of the controlling opinion of Letton, J., to the effect that "a case had not been made" under his view of the holding of this court in these cases, is a pure question of fact which this court cannot review.

How are we to determine whether the "basic finding of fact which controls the judgment is wrong" if we do not know by what test liability it was measured?

The truth is, that the so-called finding of fact of Letton, J., is not a finding of fact at all, but a conclusion as to the legal sufficiency of the evidence upon an assumed standard "of duty and of liability," of which we are not apprised. Surely a litigant will not be denied a Federal right merely because the State court failed or refused to make a sufficient finding of fact. As was said in *Carlson vs. Curtiss*, 234 U. S., 103; 34 Sup. Ct., 717:

"Although the State court might have disregarded the Federal question as having been abandoned in the trial court, recognizes plaintiff in error's contention of a Federal question and by its decision necessarily overrules it, this court must necessarily deal with the Federal question * * *. While in ordinary cases we are bound by the findings of the State court of last resort respecting matters of fact, it is hardly necessary to say that that court cannot, by omitting to pass upon the basic question of fact, deprive a litigant of the benefit of a Federal right any more than it could do so by making findings that were wholly without support in the evidence. And just as this court, where, when its appellate jurisdiction is properly invoked and all the evidence is brought before it, will, if necessary for a decision of a Federal question, examine the entire record to determine whether there is evidence to support the findings of the State court, so it is our duty, in the *absence of adequate findings*, to examine the evidence in order to determine what facts might reasonably be found therefrom and which would furnish a basis for the asserted Federal right."

To the same effect is *Southern Pacific Co. vs. Schuyler*, 227 U. S., 601; 33 Sup. Ct., 277, wherein it was said:

"It is insisted that in this case a Federal right has been denied as the result of a finding of fact which is without support in the evidence; that evidence is

before us in the record by which that insistence may be tested; and that the status of Schuyler as an interstate passenger is a *mixed question of law and fact*, so that it is incumbent upon us to analyze the evidence to the extent necessary to give plaintiff in error the benefit of its asserted Federal right. The insistence as to the power and duty of this court in such a case is well founded."

So, in *Creswill vs. Grand Lodge K. of P.*, 225 U. S., 246; 32 Sup. Ct., 822, it was held that where a conclusion of law as to a Federal right and the finding of fact are so *intermingled* as to cause it to be essentially necessary for the purpose of passing upon a Federal question, to analyze and dissect the facts, to the extent necessary to do so, the power exists as a necessary incident to a decision upon the claim of a denial of the Federal right.

The following cases also support our contention:

North Carolina R. R. Co. vs. Zachary, 232 U. S., 248; 34 Sup. Ct., 305.

Kansas City S. R. Co. vs. Albers Co., 223 U. S., 573; 32 Sup. Ct., 316.

Rector vs. City Deposit Bank Co., 200 U. S., 405, 412; 26 Sup. Ct., 289.

Washington ex rel. Oregon R. & N. Co. vs. Fairchild, 224 U. S., 510; 32 Sup. Ct., 535.

The case of *Dower vs. Richards*, 151 U. S., 658; 14 Sup. Ct., 452, does not sustain defendants' contention, but holds that this court will review a question as to the "legal effect of the evidence as bearing upon a question of Federal law" and that the decision of the State court on the effect of the evidence may be considered here. The point is one that has been established by an unvarying line of decisions in this court.

So far as the opinion of Hamer, J., is concerned, the point is not so material, for it clearly shows an entire failure to grasp the principles enunciated in the decision of this court,

and that through his erroneous interpretation and application of sec. 5239, Rev. Stat. U. S., plaintiffs have been denied a Federal right. Thus, in discussing the case as to defendant Thompson, the opinion concedes there is evidence

“to show that before the last report was signed Thompson had notice of a letter from the Comptroller of the Currency questioning the correctness of the former reports made to him by the directors, and requiring the bank officers to charge off certain worthless notes or obligations held by that institution. (This reference was to the letter of September, 1891.) That thereafter Thompson *refused to sign* any statements to the Comptroller of the Currency and took no part in the management of the bank; that * * * while it may be said that for a considerable length of time before the bank was closed by the Comptroller he had some knowledge that its financial condition was questioned, still so far as the record shows, defendant Thompson did not *personally* participate in any of the acts of which the plaintiffs complain * * *.”

And he is absolved from liability because he did not *personally participate*, although the trial court specifically found that the defendants knew untrue statements were being made and published by the officers of the bank; that they knew them to contain material false representations and that they were, in fact, false and untrue; and that they knowingly permitted, assented to and allowed the same to be made and published (Jones Trans., pgs. 44-46) and the correctness of those findings is not questioned.

This clearly demonstrates that the Supreme Court applied an erroneous rule, for it exempted defendants from liability, although they knowingly permitted and assented to the making and publication of untruthful statements by the officers of the bank in direct violation of sec. 5239, *supra*.

Again, the opinion says the United States Supreme Court, in reversing these cases, held that our “petitions were insuffi-

cient to charge the defendants with a common-law liability for fraud and deceit," a statement wholly unwarranted by the facts; that our "petitions still charge the defendants with making false statements to the Comptroller of the Currency as to the condition of the Capital National Bank, and this is the main foundation or basis for recovery," a statement equally absurd, since those reports are not accessible to the public and could not form the basis of an action; that demurrers to our petitions should have been sustained, although they contain every allegation contained in the complaint of *Thomas vs. Taylor*, 224 U. S., 73; that "unless the Supreme Court of the United States shall recede from its decision of these cases the petitions will be held insufficient by that court to state a common-law liability for fraud and deceit," an assertion justified by nothing contained in the opinion and untenable as a proposition of law; and ends with the crowning error that "plaintiffs having failed to allege and prove that the defendants *personally* knew of, or *personally* participated in, the acts of the officers of the bank of which they now complain, it seems clear that if we follow the decision of the Supreme Court of the United States in these cases, they are not entitled to recover * * *."

The opinion of Letton, J., likewise discloses a misunderstanding of the decision of this court (*Jones Trans.*, pg. 55). It assumes that this court decided that our petitions did not state a cause of action at common law for deceit and that such an action would not lie on voluntary misrepresentations.

He adheres to the former opinion of the State court that the petitions do state a common-law action (in which he is clearly right), and says he inclines to the view that the evidence would support a judgment upon such a theory of the case, but seemed to imagine there was something in the "holdings of the Supreme Court of the United States as to the measure of duty and of liability of directors under the banking laws of the United States" that precluded recovery, although it was expressly decided in *Thomas vs. Taylor*,

supra, that the knowing violation of the Federal statute was the equivalent of the *scienter* of the common-law action for fraud and deceit.

Judge Letton's Subsequent Reversal of Opinion.

(a) In this connection we desire to call attention to the statement contained in the Yates-Hamer brief, page 52, in which it is said there is nothing in the record to sustain the statement contained on page 3 of our brief, to the effect that Letton, J., having been convinced that he was wrong, voted in favor of a rehearing. We are surprised that the statement of Sedgwick, J., to that effect should be questioned (Jones Trans., pg. 93). It is certainly not to be presumed that such a statement would be made without the consent of Judge Letton, or, if so made, would be permitted to go unchallenged. But defendants err when they say "there is absolutely nothing in the record to sustain any such statement," for the record discloses (Jones Trans., pg. 65) that at the first hearing on plaintiff's motion for rehearing, "Judges Sedgwick, Letton, and Fawcett voted to allow the rehearing and thereupon Chief Justice Reese voted in favor of allowing a rehearing and declared said motion to be carried."

Thereupon the defendants moved to set aside the order granting a rehearing because of the participation of the Chief Justice. This motion was sustained on the proposition that the withdrawal of the Chief Justice was equivalent to an adjudication of disqualification and that he could not thereafter re-enter and participate in the decision of the cases, even though his withdrawal was based upon a mistake of fact; but the claim that this motion prevailed by a vote of five to one is not sustained by the record (Jones Trans., pg. 92).

When the cases came on again for ruling on the motions for rehearing, the court again stood equally divided, the

Chief Justice not sitting, and the motions were considered lost (Jones Trans., pg. 92). Thus we suffered a reversal of our judgments when but three of the seven judges concurred in the ruling opinion at the time the cases were finally disposed of, Judges Sedgwick, Letton, Fawcett, and Chief Justice Reese having indicated their disapproval of the decision.

Disregarding the technical legal effect of this vote, it does seem that when it became apparent that a majority of the court were not in accord with the previous order of reversal, there should have been no dissent to allowing a rehearing. The plaintiffs should not have been charged with the burden of affirming the lower court's judgments by a majority vote. In the circumstance, it was the duty of all the judges to vote for a rehearing.

We had hoped defendants would not force the discussion of this matter, as it cannot affect the decision of these cases, much less operate to exalt the standing of courts of justice. However, there is one statement we cannot leave unchallenged in justice to the Chief Justice of the Supreme Court of Nebraska. It is said in Mr. Thompson's brief (pg. 58) that the setting aside of the order granting a rehearing because of the Chief Justice's participation "was sound law and ethics"; "lifted all odium from the court"; "silenced all murmurs and complaints of partiality and bias,"—a most astonishing statement.

It is well known that no judge who ever honored the bench has a higher conception of the ethics of that position than Chief Justice Reese, and it was his supersensitive regard for the honor of that position that caused his withdrawal in the first instance, a withdrawal based on a mistaken recollection of a trivial incident that had occurred about twenty years previously. His associates might well have left the determination of his qualification to sit, with his own conscience. An examination of this record will convince the court that there was positively no disqualification.

That a protest against his participation should be made in a manner other than in "a gentlemanly and personal friendly way" by a judge whose brother was counsel and a most bitter partisan in the suit, is most unfortunate. And that this judge should insist on sitting after the filing of recusation, is doubly unfortunate; especially so, when by his voice the request of an associate (whose vote had made a reversal possible and who thought he had erred) for an opportunity to re-examine the case, was denied, and thereby a judgment made to stand on a technical rule of procedure, without the moral sanction of a constitutional majority. We submit if such procedure tends to exalt the judiciary and to silence murmurs of bias and partiality.

Causes of Action Based on All Reports Introduced in Evidence.

It is insisted that the judgments in these cases are based alone on the reports of date December 28, 1886, and December 9, 1892, but the contention is unfounded.

The claim is evidently predicated on the *abiter* recital of Hamer, J. (Jones Trans., pg. 51) "that when defendants Yates and Hamer signed the reports of December 9, 1892, and December 28, 1886, *which are the ones upon which this action is, in fact, predicated*, neither of them had any *personal* knowledge of their falsity * * *."

But this is no longer an open question. It was decided in the State court at the former trial, and that decision is the law of these cases.

Our petitions charge the making and publication of the two reports above referred to, which are attached as Exhibits A and B, and then allege (Jones Trans., pg. 5) that between those dates the defendants, with the fraudulent intent and purpose as aforesaid, during all of said time, made, allowed, caused, and permitted to be made at divers intervals, false statements of the condition of said bank, etc., with the in-

tent and purpose of deceiving the plaintiff, etc., and caused, acquiesced in, allowed, and permitted said false statements, etc., to be published, etc. Under these allegations there were introduced in evidence the reports referred to on page 80 of our first brief.

Addressing itself to this point, the Supreme Court of Nebraska said (74 Nebraska, 745):

"The defendants appeared to take the position that plaintiffs should be restricted to the two reports set out at length. We do not think so. The allegations of the petitions are sufficiently broad to admit proof of any and all statements made on and between the dates just mentioned. If definiteness and certainty required all such statements to be set out at length, the remedy was by motion."

Although the court had thus pointed out the proper procedure, if greater definiteness or certainty were desired the defendants entered upon the second trial without any efforts to procure it.

The reason for requiring the pleader to set out the facts upon which the fraud is predicated, is to apprise the defendant of the charge against him. The reports in the record now here for review, are the identical ones introduced in evidence at the former trial, so there can be no claim of surprise. Moreover, they were not documents in our possession. They were matters of record as easily accessible to defendants as to plaintiffs. Nearly nine years elapsed between the two trials. This was ample time to procure evidence of the truthfulness of the reports. But there is no contention that they were true. The untruthfulness is conceded.

In any event, the allegations of the petitions are sufficient to admit the proof in question. True, mere epithets or conclusions of fraud, without any statement of fact upon which the charge is predicated, are insufficient, but this rule requires the ultimate and not the evidenciary facts to be pleaded.

The charges here are that the bank was insolvent; that the statements represented it as being solvent and prosperous; that the statements were published; that the plaintiffs saw them; that they believed them to be true, and relying upon them deposited their money in the bank and lost it. The representation of insolvency is but one element of the fraud. It is the ultimate fact to be pleaded.

Caywood *vs.* Farrell, 51 N. E., 775, 776.

Clodfelter *vs.* Hullet, 72 Ind., 137.

Story's Eqty. Pleadings, sec. 252.

20 Cyc., 97.

Johnston *vs.* Spencer, 51 Nebr., 198.

Just as an allegation that there was a *partnership* is an averment of an ultimate fact.

Kahn *vs.* Central Smelting Co., 2 Utah, 371, 376.

Obiter Dicta Not Concurred in by Letton, J.

Disregarding the fact that the quoted statement of Hamer, J., is a mere recital and not a decision, the further fact remains that it is not concurred in by Letton, J., whose concurrence was necessary to the rendition of judgment.

This is conceded by defendants (Thompson's Brief, pp. 35 and 13). The question being one of State practice, this court will not review it.

Claim of Federal Right Not Limited to Exhibits A and B.

(a) The contention that plaintiffs can claim no Federal right except as such claim is based on Exhibits A and B is likewise untenable. This proposition is based upon the assumption that the petitions do not specifically charge the reports in question to have been made and published pursuant to the call of the Comptroller. But that is as true of Exhibits A and B, as of the other reports introduced in evidence, yet, this court, at the former hearing, examined the

record and found that those reports were, in fact, so made and published and concluded that our judgments were based upon them. And for that reason alone applied the test of liability prescribed by the Federal statute.

We confess we believed at the first trial that the common-law action for fraud and deceit might be maintained, although predicated upon reports of the bank's financial condition made and published pursuant to the call of the Comptroller of the Currency—in which we were sustained by the only adjudicated cases on that point at that time.

To indicate our election of this remedy and not as "the result of studied adroitness to produce a petition that would prevent removal into the Federal court," we avoided reference to the "national" character of the corporation or that the reports were made pursuant to the Federal statute. Yet, notwithstanding, this court examined the *evidence* and ascertained that the bank, of which defendants were acting as directors, was organized under the *national bank act*, and the reports upon which the judgments were based, were made and published *pursuant to the call of the Comptroller of the Currency*. It cannot consistently refuse to apply the same rule now. The record shows the reports were so made and published.

Of course, the statement that the trial court's findings are to the effect that all reports except Exhibits A and B, were unofficial and voluntary, is disproved by the record. It made no such findings. There is no distinction between the various official published statements introduced in evidence. They were all made and published pursuant to the call of the Comptroller.

IV.

Statute of Limitations.

The contention that the cause of action based on the report of December 28, 1886, is barred by limitation of time is also untenable, because, (1) the statute was not pleaded as a defense; (2) the State court did not decide the action was barred; (3) the running of the statute would not begin until the discovery of the fraud, which was not earlier than the failure of the bank, January 21, 1893. And, in any event, it is not a question this court will consider.

V.

Comptroller's Letters as Affecting Mr. Thompson's Liability.

It is said in Mr. Thompson's brief (page 7) that the earliest letter from the Comptroller is dated September 8, 1891, whereas, the latest report attested by Mr. Thompson is of July 9, 1891. This is conceded. But attention is directed to the fact that the court based liability on the attested reports, not on the ground asserted by defendant, "because he did so at his risk, since it was his duty to know or refrain from acting" (Thompson's Brief, p. 9), but because Mr. Thompson's own evidence showed he had not participated in the least in managing the affairs of the bank and was wholly ignorant of its conditions, and the court found (Jones, Trans., p. 27) that he had no actual knowledge of the truth or falsity of the attested reports, and when he attested them he *knew he had no knowledge* of their truth or falsity, but attested them recklessly and not in good faith. It was not that in spite of diligence he was ignorant of its conditions, but that he had exercised no diligence at all—had been grossly negligent and willfully delinquent. The test, it will be observed, is not if he believed the cashier

to be honest, or the statement made by him correct, but whether he had a *bona fide* belief that he himself had any actual knowledge of the bank's condition. If, as is asserted, it was impossible for him to know, he knew it, and could accordingly not honestly attest a report. To "attest" does not necessarily make a director a guarantor of the correctness of his statement. If the circumstances are such that he had any reasonable grounds for believing he actually knew the condition of the bank or the report to be true, there would be no *scienter*. Thus, where he was actually engaged in conducting the bank's affairs, but the cashier had secretly withdrawn funds or substituted forged paper so that a report made under those circumstances did not reflect the true condition of the bank, the attestation would not be knowingly false, but where there never was any participation in the management of the bank's affairs—as where he was constantly absent from its place of business, or where there were other circumstances which rendered it impossible to know—there the attestation would be knowingly false for he represents himself as having *knowledge when he knows he has not*.

The opinion of Hamer, J., is quoted:

"The rule for which plaintiffs contend, if carried to its ultimate conclusion, would make the directors of the National Bank, who has himself been imposed upon and deceived by its officers, and who has thereby suffered loss, liable to the depositors for the fraudulent acts of such officers" (Thompson's Brief, p. 50; Jones' Rec., p. 52).

That is precisely what the Federal statute does do, if the director's dilemma is brought about by his own recklessness and gross neglect of duty or his deliberate refusal to obey the directions of the Comptroller touching his duties in the premises.

This is not in conflict, but in complete harmony with the decision of this court in *Yates vs. Jones National Bank*, 206

U. S., 158, as was expressly recognized in *Thomas vs. Taylor*, 224 U. S., 73, where it was said, that the conditions of liability do not require proof of something more than *recklessness*—and that the necessity of showing an act to be, in effect, intentional, is met by proof showing a deliberate refusal to examine that which it is his duty to examine.

And coming to the reports which followed the Comptroller's letters and were not attested by Mr. Thompson, the court found he knew that these official reports of the bank were being made and published by the officers, agents, and servants of the bank; knew that said reports contained material false representations of the bank's financial condition and were, in fact, false and untrue, and with such knowledge *knowingly* permitted, assented to and allowed the same to be published (Jones Trans., pp. 44 to 46. See our first brief, pp. 8-9).

The correctness of this finding, as a finding of fact, is not questioned by the Supreme Court. On the contrary, it is impliedly conceded, for in the opinion of Hamer, J. (Jones Trans., pp. 52), it is admitted that there is evidence to show that "before the last report was signed Thompson had notice of a letter from the Comptroller of the Currency questioning the correctness of the former reports made to him by the directors and requiring the bank officers to charge off certain worthless notes or obligations held by that institution. That thereafter Thompson refused to sign any statements to the Comptroller of the Currency; that * * * while it may be said that for a *considerable length of time* before the bank was closed by the Comptroller he had some knowledge that its financial condition was questioned, still, so far as the record shows, defendant Thompson did not *personally participate* in any of the acts of which the plaintiffs complain." The very facts thus found by the State Supreme Court to exist, definitely establish the liability of the defendants under section 5239, *supra*.

It clearly demonstrates that the court's conclusion of non-liability was predicated on the erroneous assumption that *personal participation* was necessary to entail liability under that section, when, in fact, liability is incurred equally, whether the director *violates or permits* the officers, agents or servants of the bank *to violate* the provision of its title—whether he participates in or permits and assents to such violation. This was defendants' theory of the case, as is shown in their request for special findings (Thompson's brief, p. 8), where the court is asked to find, "whether in attesting such of the official reports * * * as are shown to have been attested by him, the defendant acted fraudulently and with *actual personal knowledge* that such reports, or any of them, were, in any material respect, false and untrue."

The Supreme Court's decision does not disturb the trial court's findings of fact, but holds them to be insufficient to establish liability, so that the error is one of law, committed by the Supreme Court and not the trial court, for the findings of the latter will disclose that it applied the rule of liability established by the decision of this court in these cases.

VI.

Testimony of Walter T. Scott.

The assault on the good name and reputation of Mr. Scott deserves the severest condemnation. It exposes the desperate straits to which defendants are driven in their attempt to bolster up an unrighteous case. Mr. Scott had severed his connection with the bank some years prior to its failure to embark in an enterprise on his own account and was engaged in operating a steam laundry at the time of the failure. He had prospered. He had purchased an entire block on ground on "O" street—the principal street in the city

of Lincoln—and there had installed a steam laundry, the machinery for which cost him about five thousand dollars. Shortly before the failure he was owing the bank thirteen thousand dollars on this property, which had nearly five years to run. On the plea of needing cash, Mr. Scott was induced to give another note for ten thousand dollars, secured by a mortgage on this property, which the bank agreed to rediscount and apply the proceeds on the thirteen thousand dollar indebtedness. The mortgage was negotiated, but the proceeds not so applied, with the result, that when the bank failed the mortgage was foreclosed and Mr. Scott lost all his property. This was during the financial panic of the '90's, and Mr. Scott was never able to recoup his financial losses. The property today is worth perhaps a quarter of a million.

He was seventy years old at the date of the trial and had suffered misfortune in the loss of a leg. For some years he worked as bookkeeper at the Tabitha Home, on the outskirts of Lincoln. While here he got into a difficulty that was the sole basis of the attempted impeachment. He married an employee of that institution. This aroused the enmity of Sister Ida and her associates, and an effort was made to annul the marriage. But Mr. Scott was vindicated by the decision of the Supreme Court. *Adams vs. Scott* (Nebr.), 141 N. W., 149. At the time of the trial he was in the employ of J. F. Bookstrom and Otto Newberg as bookkeeper in their plumbing establishment. To show their vindictiveness, the representatives of the Tabitha Home cautioned Mr. Scott's employees to watch him. We quote from the record (printed bill of exceptions, p. 641):

"The COURT: You say you have been warned to watch him. Now since you have been watching him, what have you discovered?

A. Nothing at all; he is straight."

The cross-examination of the impeaching witnesses will disclose how utterly their attempt failed.

He was sustained by Professor Fossler, Major J. D. Woods, Otto Newberg, J. F. Bookstrom, E. Hallet, R. H. Corner, Frank Rawlings, Lew Franklin—all men of unimpeachable character. Professor Fossler, for nearly a generation a professor in the University of Nebraska, had known Mr. Scott since 1873; had always looked upon him as a man of integrity, reliability, and truthfulness and had never heard him questioned or doubted by any one in any way. The same is true of the other witnesses.

It is significant that the trial judge who knew the witnesses and saw them on the stand, unhesitatingly resolved the issues in favor of Mr. Scott. It is also significant that the Supreme Court does not disturb but acquiesces in this conclusion. The opinion of Hamer, J., concedes there was evidence which tends to show that Thompson had notice of a letter from the Comptroller, "questioning the correctness of the former reports made to him by the directors and requiring the bank officers to charge off certain worthless notes or obligations held by that institution." This can refer to but one letter—that of September, 1891,—and Mr. Scott is the only witness who spoke to the point referred to in the opinion.

The testimony of *Doctor* Miller, who was also connected with the Tabitha Home, that Mr. Scott was a moral degenerate is an outrage and was totally discarded by the trial court. Any disinterested observer called upon to indicate which of the two (Mr. Scott or Miller) was a moral degenerate would not hesitate to designate the latter.

Argument Presented to State Supreme Court.

Criticism is made that we urged the lower court to hold that the remedy of the Federal statute for making false report is not exclusive because the law does not require the

"ten representations other than those contained in
 "the official reports made by the association to the
 "Comptroller of the Currency, and published in
 "conformity to the National Bank Act, that such
 "latter statements were counted upon in the amended
 "petition, and were, if not exclusively, *certainly*
 "*principally*, the grounds of the alleged false repre-
 "sentations covered by the proof. Under this state
 "of the record, irrespective of the nature and extent
 "of the proof required to maintain an action of
 "deceit at common law, the question is: "Did the
 "Supreme Court of Nebraska rightfully decide that
 "the plaintiff was entitled to recover against the de-
 "fendant?" in applying the rule of liability estab-
 "lished in *Gerner vs. Mosher*, 56 Neb., 135.'

"It is thus clearly established that the opinion of
 "Justice White is predicated on the assumption that
 "our case, as presented by the record, was grounded
 "upon the false representations contained in the
 "published official report. Assuming this premise
 "to be correct, the conclusion was inevitable. For
 "conceding the record disclosed evidence sufficient
 "to sustain a verdict based on a violation of sec.
 "5239—that is, that the defendants knowingly
 "violated the provisions of the National Bank Act
 "in making false representations of the bank's finan-
 "cial condition—it could not save a reversal, for the
 "defendants were entitled to have that question sub-
 "mitted to the jury under proper instructions and
 "this the trial court not only refused to do, but in-
 "stead, gave instructions eliminating entirely the
 "question of knowledge and good faith.

"Had the jury been instructed that before they
 "could return a verdict against the defendants they
 "must find that defendants knowingly made the
 "false representations charged, there could have been
 "no reversal. It would then have been immaterial
 "whether the cases were considered as arising under
 "the Federal statute or the common law—the test of
 "liability being the same. *Taylor vs. Thomas*, 106
 "N. Y. S., 538; affirmed in 108 N. Y. S., 454.

"It is immaterial upon what theory the case was
 "tried so long as the correct rule of liability was ap-
 "plied.

"A right decision will not be reversed merely because a wrong reason has been assigned therefor."
Id.

"The entire opinion of Mr. Justice White is based on a single proposition—a rule of statutory construction—namely, that 'Where a statute creates a duty and prescribes a penalty for non-performance, the rule prescribed in the statute is the exclusive test of liability.'

"We sought to avoid the application of this rule for the reason, that, while the National Bank Act expressly commanded the publication of the official report, it did not require the publication of a *true* report and that therefore the publication of a *false* report did not violate any express mandate of the statute (*Cochran vs. U. S.*, 157 U. S., 286); that the making of a false report not being a violation of the banking act the remedy provided in sec. 5239 for violations of that statute did not reach our case, and being thus left without a statutory remedy, we could resort to our remedy at the common law.

"The answer to this contention was, that while the statute did not in express words require the publication of a *true* report, that is what in effect was meant and it should be read as though the word 'true' had been interpolated—as it were.

"It will be observed the court declines to express an opinion as to the liability of directors of a national bank, under the principles of the common law, for acts outside of the express commands of the banking act and for fear the scope and application of the decision might be misunderstood, Mr. Justice White says (27 Sup. Ct., 645):

"Of course, in what has been said we have confined ourselves to the precise question arising for decision, and therefore must not be understood as expressing an opinion as to whether and to what extent directors of national banks may be civilly liable by the principles of the common law for purely voluntary statements made to individuals or the public, embodying false representations as to the financial condition of the bank, by which



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IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1915.

No. 163.

JONES NATIONAL BANK, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES ET AL.

No. 164.

BANK OF STAPLEHURST, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES ET AL.

No. 165.

UTICA BANK, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES ET AL.

No. 166.

THOMAS BAILEY, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES ET AL.

ERROR TO THE SUPREME COURT OF NEBRASKA.

SUPPLEMENTAL REPLY BRIEF OF PLAINTIFFS IN
ERROR.

J. J. THOMAS,
Attorney for Plaintiffs in Error.



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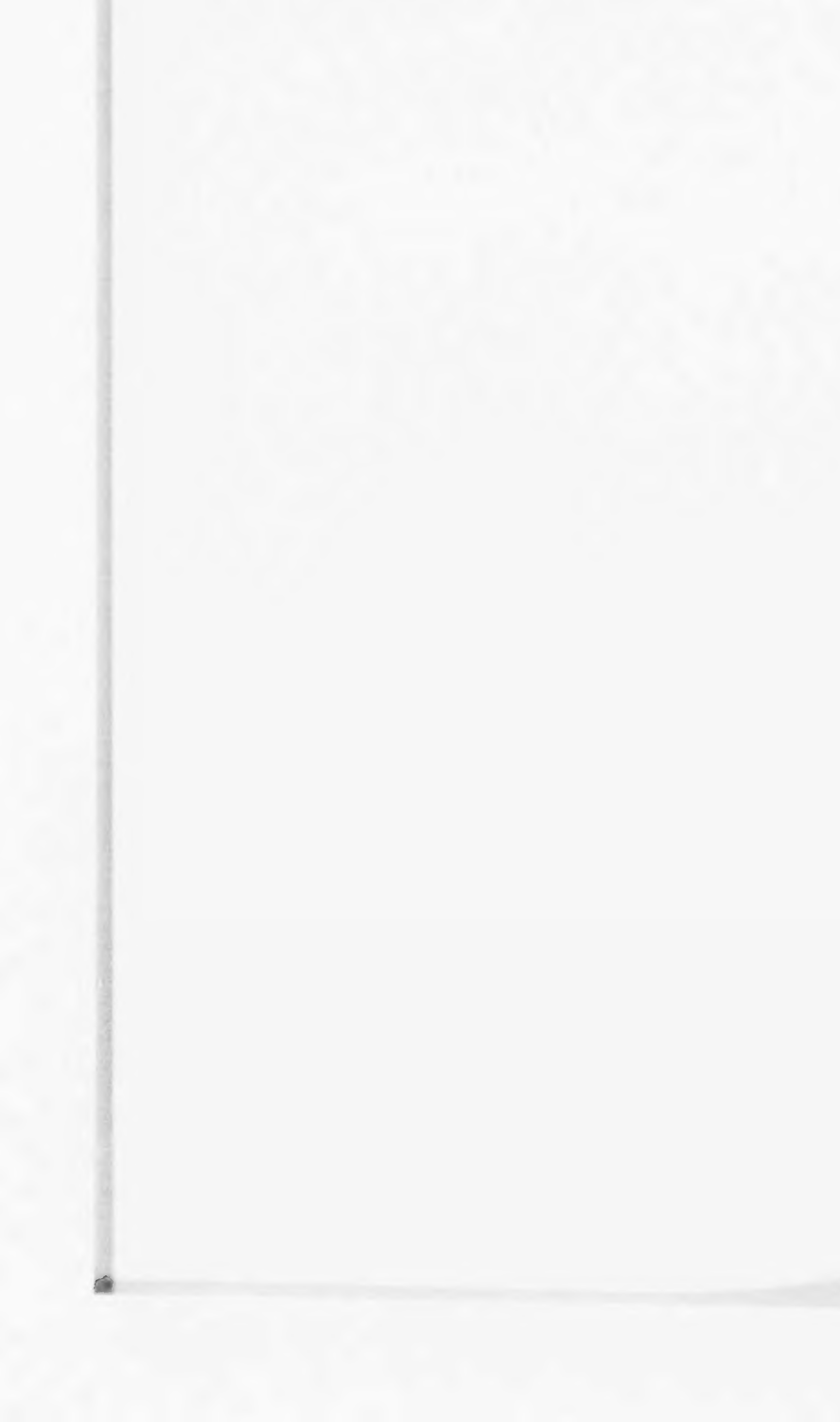
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IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1915.

No. 163.

GENERAL NUMBER 24240.

JONES NATIONAL BANK, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES, D. E. THOMPSON, LOUISA
HAMER, ADMINISTRATRIX OF ESTATE OF ELLIS P.
HAMER, DECEASED, DEFENDANTS IN ERROR.

No. 164.

GENERAL NUMBER 24241.

BANK OF STAPLEHURST, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES, D. E. THOMPSON, LOUISA
HAMER, ADMINISTRATRIX OF ESTATE OF ELLIS P.
HAMER, DECEASED, DEFENDANTS IN ERROR.

No. 165.

GENERAL NUMBER 24242.

UTICA BANK, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES, LOUISA HAMER, ADMINISTRA-
TRIX OF ESTATE OF ELLIS P. HAMER, DECEASED, DEFEND-
ANTS IN ERROR.

No. 166.**GENERAL NUMBER 24243.****THOMAS BAILEY, PLAINTIFF IN ERROR,***vs.***CHARLES E. YATES, LOUISA HAMER, ADMINISTRA-
TRIX OF ESTATE OF ELLIS P. HAMER, DECEASED, DEFEND-
ANTS IN ERROR.**

ERROR TO THE SUPREME COURT OF NEBRASKA.

**SUPPLEMENTAL REPLY BRIEF OF PLAINTIFFS IN
ERROR.**

ARGUMENT.

When these cases were argued in April last suggestions were made as to the questions before the court for review. Since the matter was not fully presented in our brief, we ask the further indulgence of the court. It is our contention that the decisive questions in the case are:

(a) Do our petitions state a cause of action under the Federal statute?

(b) Do the findings of fact of the trial court support the pleadings and judgment?

We think the following considerations support our conclusions:

(I) The State Supreme Court reviewed the cases for errors of law and did not try them *de novo*.

(II) A jury having been waived, the findings of fact of the trial court have the same force and effect in law as the verdict of a jury.

(III) The decision of the State Supreme Court does not disturb the findings of fact of the trial court.

(IV) This court upon writ of error to the State court, in an action at law, cannot re-examine questions of fact otherwise than according to the rules of the common law, and will accept the findings of fact of the trial court and review the cases solely for errors of law.

(V) If, therefore, the petitions and findings of fact of the trial court sustain the judgments the decision of the trial court must be affirmed.

As preliminary to discussion of these propositions it is necessary to review the pleadings, the findings of the trial court and the opinions of the State supreme court.

Pleadings.

The petitions allege:

1. That the defendants were directors of the Capital National Bank.

2. That as such it was their duty, actively and actually, to manage and superintend its affairs.

3. That they failed to perform this duty in matters specifically set out.

4. That they made, caused, allowed, and permitted to be made and published numerous statements of the bank's

financial condition showing it to be in a sound, solvent, and prosperous condition.

5. That it was at all times insolvent.

6. That defendants knew and it was their duty to know the bank's condition, and that by the exercise of ordinary care in the discharge of their duties they could have known its true condition, and that they *willfully, negligently, and recklessly* made and caused, allowed, and permitted to be made and published false statements as aforesaid.

7. That plaintiffs, relying upon such statements, deposited their money in the bank and lost it.

The answers of the defendants present five defenses:

1. A general denial.

2. That plaintiff's cause of action was founded on alleged facts, which, if true, constitute a violation of the national-bank act and necessitate the determination of a Federal question.

3. A former judgment in bar.

4. Satisfaction.

5. That if defendants neglected any duty or committed any of the wrongs complained of it gave rise to no cause of action in favor of plaintiffs, but to the bank or its receiver. (This under the Nebraska decisions is an admission of the facts charged in the complaint. See *North, &c., Ass'n vs. Box*, 57 Nebr., 302.)

There can be no doubt of the sufficiency of the petitions to state a cause of action under the Federal statute. They

include every averment contained in *Thomas vs. Taylor*, 224 U. S., 73, which was approved by this court on a record almost identical in its facts and history.

The sufficiency of our petitions has not been questioned in this court. We refer to it because a misconception on this point is the basic error of Judge Letton's opinion, as we show later.

The Findings.

Owing to requests for numerous special findings made by the defendants the findings of the trial court are somewhat extended. Most of them are uncontroverted. Thus it is not denied:

(1) That the official statements in the record were attested by the defendants and published as alleged.

(2) That they came to the knowledge of the plaintiffs and were the cause of their deposits and subsequent loss.

(3) That the statements showed the bank to be in a sound, solvent, and prosperous condition.

(4) That the bank was at all times insolvent; never, in fact, had any capital, surplus, or undivided profits, and when it ceased doing business its liabilities exceeded its assets by more than a million dollars (nearly a million and a half).

This eliminates every question except that of *scienter*. The greater portion of the testimony was necessary to prove the insolvency of the bank at the time of the making and publishing of the various statements put in evidence, and it was because this question was no longer controverted that we omitted some of the testimony from the printed record. Nothing, however, has been omitted that would have the least bearing on the question of *scienter*.

The defendants have been given an opportunity to designate for printing any further evidence that would be material to the question at issue. Their inability to do so exposes the insincerity of their contention that this court could not consider the question on its merits because of omitted testimony.

Coming now to the question of *scienter*, we shall see that the trial court clearly conceived and correctly applied the test or rule of liability announced by this court.

Yates' and Hamer's Requests for Special Findings.

By Interrogatory III (Jones Record, page 21) the court was asked to find that neither the defendants Yates nor Hamer knowingly violated or knowingly permitted any of the officers, agents, or servants of the national bank to violate any of the provisions of the national-banking act, under which said bank was operated. In response to which the court found against the defendants and in favor of the plaintiffs (*Id.*, p. 26).

By Interrogatory IV (*Id.*, p. 21) the court was asked to find that neither the defendants Yates nor Hamer knowingly participated in or assented to any violation of any of the provisions of said national-banking act by any of the officers, agents, or servants of said Capital National Bank. In response to which the court found against the defendants and in favor of the plaintiffs (*Id.*, p. 26).

By Interrogatory IX (*Id.*, p. 21) the court was asked to find that defendant Yates, in attesting the reports of December 28, 1886, and December 9, 1892, did not with actual knowledge thereof or intentionally make an untrue statement or representation of the assets or liabilities of said Capital National Bank nor of any of the items of either its assets or liabilities. In response to which the court found for the defendant as to the report of December 28, 1886, and against him as to the report of December 9, 1892 (*Id.*, p. 26).

By Interrogatory X (*Id.*, p. 21) the court was asked to find that neither the defendants Yates nor Hamer—

“with actual knowledge or intentionally made any untrue statement or representation of any or all of the assets of the Capital National Bank in any or all of the statements or reports made to the Comptroller of the Currency and published by said bank as required by the national-banking act, which reports are shown in the testimony in this case.”

In response to which the court found that they did (*Id.*, p. 26).

Mr. Thompson's Requests for Special Findings.

In response to Interrogatory No. 1 (Jones Record, page 22), the court found that the allegations of plaintiff's petition “of official misfeasance and mismanagement” were sustained by the evidence and were true (*Id.*, p. 27).

Interrogatories Nos. 2 and 3, pertaining to oral misrepresentations, were found in favor of the defendant (*Id.*, p. 27).

By Interrogatory No. 4, the court was asked (*Id.*, p. 22) whether this defendant at any time prior to its (the bank's) failure or suspension had actual personal knowledge that any of the official statements made by the Capital National Bank to the Comptroller of the Currency referred to in the petition or the evidence were in any material respect false or untrue. In response to which the court found in the affirmative (*Id.*, p. 27).

In response to Interrogatory No. 5 (*Id.*, p. 23), the court found that the defendant Thompson attested only the five reports mentioned (being those made prior to September, 1891).

By Interrogatories Nos. 6 and 7 (*Id.*, p. 23), it was asked whether in attesting such official reports as are shown to have been attested by him the defendant acted in good

faith, or whether they were attested fraudulently and with actual personal knowledge that such reports, or any of them, were in material respects false and untrue? In response to this, the court found (*Id.*, p. 27) that the defendant had no actual personal knowledge of the truth or falsity of the reports attested by him, but in attesting them he relied on statements made to him by the president and cashier of the bank and without any investigation, and that at the time of attesting such statements the defendant knew that he had no personal knowledge of the truth or falsity of such reports, and that the same were *attested recklessly* and without performing his duties as a director or ascertaining the truth or falsity of such reports, before the same were attested by him, and in this respect the court found the same were not made in good faith.

Then follows a general finding on the issues for the plaintiffs and that the allegations of their petitions are true (*Id.*, p. 28).

Subsequent requests for additional special findings were made. The requests of Yates and Hamer (*Id.*, pp. 23-24) refer to statements and representations that were not made pursuant to the call of the Comptroller or any requirement of the Federal statute and need not be considered.

The additional requests of defendant Thompson are pertinent to the issues.

Interrogatory No. 1 is as follows (Jones Record, p. 24):

"Did this defendant ever at any time personally make, compile, issue, or circulate any financial statement of the resources and liabilities of the Capital National Bank of an unofficial or voluntary character, separate and apart from the official reports which the court finds this defendant attested, of dates, respectively December 28, 1886; August 1, 1887; October 2, 1890; December 19, 1890, and July 9, 1891?"

In response to this interrogatory the court found (*Id.*, p. 43) that the defendant personally made, compiled, issued,

or circulated no statements other than those mentioned, but that he knew financial statements of the resources and liabilities of the Capital National Bank of an official as well as of an unofficial and voluntary character were being made, compiled, issued, published, and circulated by the bank, and that he knowingly permitted and assented and allowed the same to be made, compiled, issued, circulated, and published by the officers of the bank.

And so in response to Interrogatory No. 2 (*Id.*, p. 24) the court found (*Id.*, p. 44) that while the defendant Thompson did not personally direct the making and publication of the financial statements in evidence, he knew they were being made and published by the bank from time to time, and that he knowingly assented to and allowed the same to be made, issued, circulated, compiled, and published by the officers of the bank.

Findings on Court's Own Motion.

On its own motion the court found (Jones Record, page 45) that from and after September, 1891, the deceased Hamer and the defendants Yates and Thompson *had knowledge and knew* that the statements, advertisements, and representations of the bank's financial condition, both official and unofficial, were being published in the newspapers, as alleged in the amended petition, and that they *contained material false representations* of the financial condition of the bank, and *were in fact false and untrue* as in plaintiff's amended petition alleged, and that (*Id.*, p. 46), *with knowledge* of all the matters and facts aforesaid, they and each of them *knowingly permitted, assented to, and allowed* the same to be made, published, and advertised as in the amended petition alleged, ending with a general finding on the issues joined for the plaintiffs and against the defendants, and that the allegations of the plaintiffs' amended petition are true.

These findings recognize the existence of liability under the Federal statute:

(1) Where a false report is knowingly attested by a director.

(2) Where a director is knowingly ignorant of the truth or falsity of the statement, and attests it recklessly, or where he makes an attestation that carries with it an implied representation of knowledge when he is conscious he has no knowledge of the matter and the statement is in fact false and untrue.

(3) Where the injury is the result of a deliberate refusal to perform a duty enjoined by law.

(4) Where a director knowingly permits, allows, or assents to the making of false statements by the officers, agents, or servants of the bank.

Decision of the State Supreme Court.

It is conceded that the judgment of reversal must stand upon the concurrence of Letton, J. This must be so, for his concurrence was necessary to afford a constitutional majority of the court. It follows that we must go to that opinion to ascertain what it was the court decided, for the concurring opinion expressly limits and restricts its concurrence in the reversal to the precise grounds therein specified.

That the opinion discloses an erroneous conception of the law admits of no doubt. A brief analysis will suffice:

"I concur in the view that the amendments made after the remand do not change the issues, and only set out more fully a cause of action for deceit at common law. The issues, then, are the same as when the case was presented to the Supreme Court of the United States" (Letton, J., concurring in part. Jones Record, page 55).

That the issues presented by the pleadings are the same may be conceded, but that they state only a cause of action for deceit is incorrect, for they also state a cause of action under the Federal statute:

"A careful reading of the history of this case set out in the opinions of this court and in those of the several inferior Federal courts, before which the question was presented, shows it was their opinion that the petitions charge only a liability at common law for deceit, and not one under the national-banking acts" (*Id.*).

These decisions do not hold that the petitions charge *only* a liability at common law. They were predicated upon the theory that if damages resulted from a false statement contained in reports made by national-bank directors and published pursuant to the call of the Comptroller under the Federal statute, an injured depositor had his election of remedies; he might maintain an action at the common law in deceit or pursue his remedy under the Federal statute (whereas this court decided that the statutory remedy was exclusive). Whether the petitions stated a cause of action under the Federal statute was not determined, it being assumed the plaintiff had elected his remedy at the common law. This was true in the case of *Thomas vs. Taylor*, 224 U. S., 73, where the petition was held sufficient under either theory:

"The judgment of this court, which was reversed by the Supreme Court of the United States, was based upon the theory that the pleadings contained no Federal question and stated merely a common-law liability" (*Id.*).

The judgment of the State court was based upon the theory that the common-law action for deceit would lie, and that the plaintiff had elected its remedy. The sufficiency of the petition under the Federal statute was not considered:

"The Supreme Court of the United States held that a Federal question was presented, and that 'the measure of responsibility, concerning the violation by directors of express commands of the national-bank act, is, in the nature of things, exclusively governed by the specific provisions on the subject contained in that act.' *Yates vs. Jones Nat. Bank*, 206 U. S., 158, 178" (*Id.*).

What this court decided was that the official reports counted upon in the amended petition were, "if not exclusively, certainly principally, the grounds of the alleged false representations *covered by the proof*." There is no intimation that the petition did not state a cause of action under the Federal statute nor that the evidence was insufficient to sustain the judgment. The decided point was that the *proof* showed that our action was based on official reports, and that inasmuch as the statutory remedy was exclusive, the trial court's instructions to the jury were erroneous, because they directed the jury to return a verdict regardless of proof *of scienter*:

"I agree with the former judgment of this court and that of the several inferior Federal tribunals before which the question was presented, that the petitions state a cause of action at common law for deceit, but think this court is bound by the opinion of the Supreme Court of the United States."

This is ambiguous. It does not give the writer's conception of that opinion. Does it mean that this court decided that the petitions did not state a cause of action at common law or under the Federal statute? The import is that the writer still contends that the petitions do state a cause of action at common law, but thinks this court has decided otherwise. This is borne out by the language which follows:

"I am also inclined to the view that the evidence would support a judgment on such a theory of the case. The findings of the district court are to that

effect. I am not satisfied they are unsustained by the evidence. The presumption is they are so sustained * * * " (*Id.*).

That is, if they are sufficient to state a cause of action for deceit, "the evidence would support a judgment on such a theory of the case." That the petitions do state a cause of action under either theory is too clear for argument.

The opinion closes with the language:

"* * * but I have not examined the evidence so critically as would be necessary to determine this for the reason that under the holdings of the Supreme Court of the United States as to the measure of duty and of liability of directors under the banking laws of the United States, I think a case has not been made. For that reason alone I concur in the conclusion;"

(not in the opinion of Hamer, J., but in the judgment of reversal) (*Id.*).

Here, again, the opinion is ambiguous. It does not disclose the writer's conception or interpretation of 'the measure of duty and of liability' established by the decisions of this court. Viewed in its entirety, the deduction is that Judge Letton's opinion assumed that, by the decision of this court, he was bound to decide (albeit against his own opinion) that our petitions do not state a cause of action.

Not a Finding of Facts.

Certain it is that Judge Letton did not assume to try the case *de novo*. This the court could not do under the State constitution and statutes, and has never assumed to do. The opinion itself disclaims a critical examination of the evidence, and does not assume to find facts. It assumes the evidence to be sufficient to sustain the pleadings, so that if the petitions sustain the judgments the cases should have been affirmed. It does not question the sufficiency of the

findings of fact to support the petition, but concludes that a case has not been made because the petition does not state a cause of action.

Letton's Opinion Construed with the Other Opinions.

The writer of the majority opinion, Hamer, J., fell into the same error that we have noted in the opinion of Judge Letton. In his opinion he says (Jones Record, page 51) that—

“unless the Supreme Court of the United States shall recede from their decision of these cases the petitions will be held insufficient by that court to state a common-law liability for fraud and deceit as against the defendants, who were simply directors of the Capital National Bank.”

It was undoubtedly upon this proposition that Judge Letton concurred. He indicates clearly in his opinion that it is his conception of the previous decision of this court that our petitions do not state a cause of action, and he closes with the statement: “For that reason alone I concur in the conclusion.”

All doubt on this point is dispelled by the dissenting opinion of Sedgwick, J. (Jones Record, page 61). The opening sentence of that opinion is:

“It seems to me that the opinion and the concurring opinion are both predicated upon the capital error of assuming that it has been decided by the Supreme Court of the United States that the action is one of deceit at common law and for that reason cannot be maintained.”

He then quotes the portion of Judge Hamer's opinion which we have just quoted and remarks (*Id.*, p. 62):

“It seems to me wonderful that any member of this court should so completely misunderstand the opinion of that court” (referring to the Supreme Court of the United States).

Referring to Judge Letton's opinion, he says:

"The concurring opinion falls into the same remarkable error as the first sentence shows" (*Id.*, p. 62).

The opinion continues with an able exposition of what this court did in fact hold, and shows conclusively that this court reversed these cases on account of an erroneous instruction to the jury and not on account of the insufficiency of the petitions, nor because these actions could not be maintained in the State court in their present form. He says further (*Id.*, p. 64):

"And yet this court states as a reason for reversing this judgment that 'unless the Supreme Court of the United States shall recede from its decision of these cases, the petitions will be held insufficient by that court to state a common-law liability for fraud and deceit as against the defendants, who are merely directors of the Capital National Bank.'"

No one was in better position to know upon what proposition the majority of the court based its conclusion than Judge Sedgwick, and he denominates the point on which Judge Letton concurred alone, the "capital error" upon which both the opinion and the concurring opinion are founded.

Construing the opinions thus together, we find the one controlling consideration discussed by all, is the matter of the sufficiency of our petitions, on which Hamer and Letton express themselves in the negative while Sedgwick affirms their sufficiency.

I.

THE STATE SUPREME COURT REVIEWED THE CASES FOR ERRORS OF LAW AND DID NOT ASSUME TO TRY THEM DE NOVO.

On page 3 of the brief of the defendants Yates and Hamer adverse counsel quote from chapter 18, article 2, section

640, of the Revised Statutes of Nebraska for 1913, as follows:

"When a judgment or final order shall be reversed either in whole or in part, in the supreme court, the court, reversing the same, shall proceed to render such judgment as the court below should have rendered, or remand the cause to court below for such judgment; *and the court reversing such judgment or final order, shall not issue execution in causes that are removed before them on error, on which they pronounced judgment as aforesaid, but shall send a special mandate to the court below* * * *"

(The italicized portion was omitted from adverse counsel's quotation*), and it is contended, upon the authority of this provision, that the State Supreme Court constituted itself a trial court to try the issues *de novo* and render such judgment as the court below should have rendered.

No authorities are cited in support of this proposition.

The contention is absurd. This statute has been in force since 1866 (Rev. Stat. of Nebraska, Code Civil Pro., title 16, ch. 1, sec. 594) and has never been so interpreted. No one has ever contended that the Supreme Court of the State, in reviewing an action at law, tried the case *de novo*.

Under the Revised Statutes of 1866 there were two methods of reviewing judgments and decrees. Code Civil Procedure, title 16, page 496, provided for proceedings in error in civil cases and titles 21 and 24 provided for appeals in suits in equity. The quoted provision was a part of sec. 594, title 16, which referred *exclusively* to proceedings in error. Sec. 582, title 16, provided:

"A judgment rendered, or final order made by the district court, may be reversed, vacated or modified by the supreme court for errors appearing upon the record,"

and has so remained, unmodified (Comp. Stat. Nebraska,

* NOTE.—All italics in brief are ours unless otherwise designated.

1911, Code Civ. Proc., sec. 582; Rev. Stat. Nebr., 1913, Code Civ. Proc., sec. 626).

Section 584, same title, provided the procedure to obtain such reversal, vacation or modification should be by—

“petition to be entitled ‘petition in error’ filed in a court having power to make such reversal, vacation or modification, setting forth the errors complained of and thereupon summons in error shall issue and be served, or publication made, as in the commencement of an action.”

Sec. 774 of title 24, entitled “Chancery,” provided that:

“In all actions in chancery, either party may appeal from the decree rendered or final order made by the district court, to the supreme court of this territory,”

and other portions of this title and title 21 prescribed the procedure for perfecting such appeals.

Code Civil Procedure, title 1, sec. 2, page 394, Rev. Stat. 1866, provided that—

“The distinction between *actions at law*, and the forms of all such actions and suits heretofore existing, is abolished; and there shall be, hereafter, but one form of action, which shall be called a civil action.”

On June 19, 1867, the legislature of the State passed an act amending sec. 2, title 1, and abolishing the distinction between *actions at law* and *suits in equity* and providing instead that there should be but one form of action called a “Civil Action,” and repealed title 24 of the Revised Statutes of 1866, entitled “Chancery,” but through inadvertence did not repeal title 21, referring to appeals.

Irwin vs. Calhoun, 3 Nebr., 453.

And while said section 594 was in full force and effect and under this state of the law it was decided in Irwin vs. Calhoun, 3 Nebr., 453, that—

"Since the passage of the act of 1867 abolishing the distinction between *actions at law* and *suits in equity* and repealing title 24 of the Code of 1866, entitled 'Chancery,' no appeal lies to the Supreme Court. The only remedy for obtaining a review of judgments rendered in the district court, whether in actions legal or equitable, is by petition in error."*

And even while the provisions concerning appeals in equity cases were assumed to be in force, the court held in the early case of *Robertson vs. Hall*, 2 Nebr., 17, that—

"no such proceeding as an appeal for trial *de novo*, in an action at law, from the District to the Supreme Court is known to our law."

That has remained the settled law of our State, although appeals in equity were thereafter again provided for.

In the opinion *Mason, C. J.*, remarked that if the legislature had intended that issues of fact should be tried in the Supreme Court, they would have provided some mode for obtaining jurors (*Id.*, p. 19). He had in mind, no doubt, article 1, section 6 of the State Constitution, which provides that "the right of trial by jury shall remain inviolate," and thus guarantees trial by jury in all cases where that right existed at common law.

After the decision in *Irwin vs. Calhoun*, *supra*, the legislature again provided a method for appeals in equity, in an act approved March 3, 1873, entitled "An act to provide for appeals in actions in equity," Gen. Stat. Nebraska, 1873, ch. 57, sec. 1022, page 716.

In 1903 the legislature passed an act that became sec. 681a, Code Civil Proc. Comp. Stat., 1911. It provides as follows:

"That in all appeals from the district court to the Supreme Court *in suits in equity* * * * wherein review of some or all of the findings of fact of the dis-

* The reference to the title "Appeals" contained on page 456 was evidently intended as title 21, page 512, instead of title 24, page 520.

district court is asked by the appellant, it shall be the duty of the Supreme Court to re-try the issue or issues of fact involved in the finding or findings of fact complained of upon the evidence preserved in the bill of exceptions, and upon trial *de novo* of such question or questions of fact reach an independent conclusion as to what finding or findings are required under the pleadings and all the evidence, without reference to the conclusion reached in the district court or the fact that there may be some evidence in support thereof."

Prior to 1907 in law cases the plaintiff in error was required to file in the Supreme Court his petition in error and a transcript of the proceedings, whereupon summons in error issued (Comp. Stat., 1903, secs. 584 and 586, Code Civ. Proc., title XVI, entitled "Error in Civil Cases"). In equity cases on appeal the procedure was to file in the office of the clerk of the Supreme Court a certified transcript of the proceedings and have the same properly docketed in the Supreme Court (Comp. Stat., 1903, sec. 675, Code Civ. Proc., title XXI, entitled "Appeals from the District to the Supreme Court").

In 1907 (Laws of Nebr., 1907, chapter 125, p. 495), the legislature undertook to simplify the procedure necessary to perfect appellate proceedings by assimilating error proceedings and appeals. It repealed secs. 584 and 675, Code Civ. Proc. (relating, respectively, to error proceedings and appeals) and provided (sec. 1) that:

"The proceedings to obtain a reversal, vacation or modification of judgments and decrees rendered or final orders made by the district court" (except in criminal cases) should be "by filing in the Supreme Court a transcript certified by the clerk of the District Court, containing the judgment, decree or final order sought to be reversed, vacated or modified," and that "the filing of such transcript shall confer jurisdiction in such cause upon the Supreme Court."

Section 4 provided that each error asserted and intended to be urged should be set out particularly in the brief and that no

petition in error or other assignment of errors should be required.

This was the procedure at the time these cases were taken up and decided in the State Supreme Court. No one has ever contended that the Supreme Court of the State retried the facts in reviewing an action at law. Throughout all the adjudicated cases the Supreme Court has recognized the distinction between reviewing actions at law for errors and trying suits in equity *de novo*, and conceded to litigants the constitutional right to have questions of fact in law cases tried by a jury.

Thus it has been held repeatedly that the Supreme Court cannot review an action at law except by proceedings in error. In the exercise of its appellate jurisdiction the Supreme Court reviews actions at law according to the rules of the common law and does not try them *de novo*.

Roode vs. Dunbar, 9 Nebr., 95.

State ex Rel. Miller vs. Lancaster Co., 13 Nebr., 223.

Prentice Brownstone Co. vs. King, 39 Nebr., 816.

State ex Rel. McMullen vs. Affholder, 44 Nebr., 497.

Campbell vs. Farmers & Merchants Bank, 49 Nebr., 143.

Nebr. Wesleyan Uni. vs. Craig, 54 Nebr., 173.

Lowe vs. Riley, 57 Nebr., 252.

Cary vs. Kearney Nat. Bank, 59 Nebr., 169.

Van Doren vs. Empkie Shugart Co, 2 Nebr., Unoff., 818.

We refer to a few cases to show that the scope of review, as well as the procedure, is inconsistent with any other theory. Thus:

A verdict based on conflicting evidence is conclusive.

U. P. R. R. Co. vs. Rassmussen, 25 Nebr., 810.

Mere preponderance of testimony against a verdict is not enough to warrant the court in disturbing it.

Jones vs. Edwards, 1 Nebr., 170.

Blackburn vs. Ostrander, 5 Nebr., 219.

Conner vs. Draper, 34 Nebr., 870.

Storz vs. Riley, 41 Nebr., 822.

A verdict upon conflicting evidence will not be disturbed except for specific errors occurring at the trial.

Douglass vs. Smith, 75 Nebr., 169.

Where the facts are disputed, it is solely the province of the jury to determine the same.

Ogden vs. W. O. W., 78 Nebr., 804.

Where verdict is founded on conflicting testimony, the Supreme Court will not enquire into the preponderance of the evidence.

Cady Lbr. Co. vs. Wilson Steam Boiler Co., 80 Nebr., 607.

Where conflicting testimony is fairly submitted to a jury the court has no right to interfere with their findings.

Hugh vs. Merchants Bank 6 Nebr., 155.

A question raised by conflicting evidence is for the jury and not for the court of review.

Angle vs. Bilby, 25 Nebr., 595.

So law actions cannot be reviewed unless the complaining party has filed in the trial court a motion for new trial, specifying the errors complained of, so as to afford the court an opportunity to correct its own errors by granting a new trial.

Carmack vs. Erdenberger, 77 Nebr., 592 (1906).

Waxham vs. Fink, 86 Nebr., 180 (1910).

State vs. Farrington, 86 Nebr., 653 (1910).

Tait vs. Reed, 91 Nebr., 235 (1912).

Lowe vs. Keens, 90 Nebr., 565 (1912).

Hammond vs. Edwards, 56 Nebr., 631 (1898).

And only such errors will be examined in the Supreme Court as are there assigned and have previously been brought to the attention of the trial court by motion for new trial.

Waxham *vs.* Fink, 86 Nebr., 180.

While motions for new trial are unnecessary in appeal of equity cases.

Ogden *vs.* Garrison, 82 Nebr., 302.

And no assignments of error are required in equity cases (indeed, they would be useless), as the cases are tried *de novo* and without reference to the decision of the trial court.

Lion Bond. & Surety Co. *vs.* Capital Fire Ins. Co., 96 Nebr., 51-52.

In the absence of a motion for a new trial in a law action the only question to be considered on appeal is the sufficiency of the pleadings to sustain the judgment.

Shoff *vs.* Ash, 95 Nebr., 255 (1914).

Lau *vs.* Lindsey, 3 Nebr., Unoff., 681.

Tait *vs.* Reed, 91 Nebr., 235.

The act of 1903 (Laws 1903, Chapter 125, Comp. Stat. 1911, Code Civil Proc., Sec. 681a), providing for trial *de novo* of equity suits on appeal "does not disturb the conclusiveness of decisions of fact by juries or by trial judges sitting in their stead *in law cases*."

First National Bank *vs.* Crawford, 78 Nebr., 665 (1907).

The distinction between error proceedings in actions at law and appeals in equity is well discussed in Western Cornice & Mfg. Works *vs.* Leavenworth, 52 Nebr., 418, decided in 1897, under the old law, and is followed in Bishop *vs.* Huff, 81 Nebr., 729, decided in 1908, since the adoption of the new procedure.

In the former case, at page 422, it is said:

"It has been said of an appeal: 'The term "appeal" is, in the several States, used in very different senses, and has to a great extent, in statutes and decisions, lost its distinctive meaning, having become the generic term for all forms of rehearing, or else nearly or quite synonymous with "error" or "new trial." 2d Am. & Eng. Encey. Law (2d ed.), 425-6. * * * "There is a clear distinction made in the Code of Civil Procedure of this State, between proceedings by petition in error and appeal. * * * In an appeal in this State the hearing in the appellate court may be said to be a trial *de novo*—a retrial of the same issues on the same record." * * *

In *Bishop vs. Huff*, *supra*, it is said:

"A clear distinction exists in this State between an appeal in an action at law and an appeal in a suit in equity. In the latter case the appellate court does not merely review the actions of the trial court, but affords a retrial."

So often has this principle been recognized that we need only refer to the last published volume of the Nebraska Reports, volume 97.

In *Haight vs. Omaha & C. B. St. Ry. Co.*, 97 Nebr., 293, decided December 4, 1914, Letton, J., said (p. 294):

"In this state of the evidence *it was for the jury, and is not for this court*, to determine whether the plaintiff or these other witnesses were telling the truth."

Kohn vs. Munson, 97 Nebr., 170, decided October 30, 1914:

"It is for the jury to find the facts, and their verdict will not be disturbed if there is evidence to support it."

De Noon vs. Lincoln Traction Co., 97 Nebr., 1, decided October 16, 1914, per Reese, C. J. (p. 4):

"All questions of fact upon which reasonable minds might differ must be solved by the jury. *McLean vs. Omaha & C. B. R. & B. Co.*, 72 Nebr., 450. This, we take it, is the settled law."

Calbreath vs. Barnford, 97 Nebr., 830, decided March 13, 1915, per Morrissey, C. J. (p. 832):

"There is no question of law involved. * * * All disputed questions of fact having been properly submitted to the jury, and the evidence being sufficient to sustain the verdict, under the general rule governing cases of this character, we *cannot interfere with the findings of the jury.*"

Davis vs. Manning, 97 Nebr., 658, decided January 29, 1915, per Sedgwick, J. (p. 663):

"As has often been decided we cannot set aside a verdict of a jury because it seems probable that the court might have arrived at a different conclusion upon the facts presented."

Wenquist vs. Omaha & C. B. St. Ry. Co., 97 Nebr., 554, decided January 2, 1915, per Sedgwick, J. (p. 560):

"The questions of fact involved in this case are peculiarly within the province of the jury. *This court is not authorized to retry those questions.*"

Langdon vs. Withnell, 97 Nebr., 335, decided December 4, 1914, per Fawcett, J. (p. 337):

"Had the writer been the trier of fact, his finding would have been different from that returned by the jury; but that fact alone is not sufficient to warrant us in disturbing the verdict."

It is needless to further multiply citations. Any other course would be in direct violation of the State constitution (Art. I, sec. 6): "The right of trial by jury shall remain in-

violate"—which guarantees the right of trial by jury in cases where that right existed at the common law.

Omaha Ins. Co. vs. Thompson, 50 Nebr., 584.

Risse vs. Gasch, 43 Nebr., 288.

An attempt by the legislature to deprive a citizen of this right and vest in an appellate court the right to retry questions of fact would be unconstitutional.

Flanagan vs. Guggenheim Smelting Co. (N. J.), 44 Atl., 762.

While all appellate proceedings in this State are now denominated "appeals," the distinction between review upon error in law cases and appeals in equity has been uniformly recognized as well since as before the adoption of the simplified procedure.

Just as the Code provision (Rev. Stat. Nebr., 1913, Code Civ. Proc., ch. 1, sec. 1), although it has abolished the distinction between actions at law and suits in equity, and provided that there shall be but one form of action called a "civil action," it did not abolish the distinction between law and equity.

Hopkins vs. Washington County, 56 Nebr., 596.

"A writ of error is none the less a writ of error because the statute calls it an appeal."

Flanagan vs. Guggenheim Smelting Co. (N. J.), 44 Atl., 762-6.

A statute which assumes to authorize the appellate court to review questions of fact upon a writ of error is unconstitutional, as the effect of this would be to deprive the trial court's judgment of its attribute of finality as to fact, and confer that authority upon the appellate court.

Ibid.

"This attribute has characterized such judgments since the earliest age of the common law. They have been final as to fact, though not as to law."

Ibid., page 763.

In the Appeal of Long (Pa.), 19 Atl., 806, it is said that an act providing—

"that all appellate proceedings in the Supreme Court heretofore taken by writ of error, appeal or certiorari, shall hereafter be taken in a proceeding called 'appeal,' does not authorize the Supreme Court in an appellate proceeding which would formerly have been taken by certiorari to consider the evidence or the opinion of the lower court, as might have been done under a former appeal, since the distinction between the three modes of reviewing decisions is not done away with, though the same name applies to them all."

That the State Supreme Court reviewed these cases upon error is shown by its own judgment "entered of record upon the journal" on January 31, 1913 (Jones Rec., p. 48):

"This cause coming on to be heard upon appeal from the district court of Seward county, was argued by counsel and submitted to the court; upon due consideration whereof, the court *doth find error apparent in the record* of the proceedings and judgment of said district court: it is therefore considered, ordered, and adjudged that said judgment of the district court be, and the same hereby is, reversed and the action dismissed."

The portion of the judgment ordering a dismissal is predicated upon sec. 640 Civ. Code, authorizing the Supreme Court—

"to render such judgment as the court below should have rendered, or remand the cause to the court below for such judgment."

Of course, where the court below could not render such judgment the Supreme Court may not,

The exercise of this power is discretionary, except where trial of an issue for which the Constitution guarantees right of jury trial is necessitated.

Porter vs. Sherman Co., 40 Nebr., 274.

Such judgment is rendered where, as was said in *American Surety Co. vs. Musselman*, 90 Nebr., 58, 62—

“the record before us shows that there was no theory on which defendant can ever escape liability.”

This procedure is correct where such “judgment was (is) required by the state of the pleadings” (*Slocum vs. N. Y. Life Ins. Co.*, 228 (U. S.), 364; 33 Sup. Ct. Rep., 523, 528, 530) and was doubtless concurred in by Letton, J., on the theory that the petitions did not state a cause of action.

II.

A JURY HAVING BEEN WAIVED, THE FINDINGS OF FACT OF THE TRIAL COURT HAVE THE SAME FORCE AND EFFECT IN LAW AS THE VERDICT OF A JURY.

Madison National Bank vs. Groves (Nebr.), 154 N. W., 207.

Powers vs. Bohuslav, 84 Nebr., 179.

Dorsey vs. Wellman, 85 Nebr., 262.

Darr & Spencer vs. K. C. Hay Co., 85 Nebr., 665.

The same rule applies in the Federal courts.

Tyng vs. Grinnell, 92 U. S., 467.

III.

THE DECISION OF THE NEBRASKA SUPREME COURT DOES NOT DISTURB THE FINDINGS OF FACT OF THE TRIAL COURT.

This necessarily results as a corollary to proposition I. Sec. 582, Code Civ. Proc., Comp. Stat. Nebr., 1911, which was in force when these cases were tried, provides:

"A judgment rendered or final order made by the district court, may be reversed, vacated or modified by the Supreme Court for errors appearing on the record."

Motions for new trial were filed in the trial court, and errors of law relied upon for reversal were set out in the brief in the Supreme Court.

The Supreme Court of the State reversed the cases for errors of law and did not assume to try them *de novo*, as it never does in actions at law.

Judge Letton did not assume to make findings of fact. If he did, a reading of the opinion should disclose what the facts are; yet no one can read it and obtain the slightest information as to the facts.

To say "a case has not been made" is clearly not a finding of fact, for although applied to the sufficiency of the evidence to sustain the findings, it would be no more than a conclusion of law as to the legal effect of the evidence. But the opinion does not go that far; it does not question the sufficiency of the evidence to sustain the findings. Judge Letton says he is still of the opinion that our "petitions state a cause of action at common law for deceit," but thinks he is bound by the opinion of the Supreme Court of the United States to hold otherwise. He also says he is "inclined to the view that the evidence would support a judgment upon such a theory of the case"—that is, upon the theory that the petitions state a cause of action at common law—that the "find-

ings of the district court are to that effect," and that he is "not satisfied they are unsustained by the evidence. The presumption is that they are so sustained. * * *" This concedes that the evidence does sustain the findings. Indeed, his argument is based upon the assumption that it does. His conclusion that "a case has not been made" results from his erroneous conception of the decision of this court concerning the sufficiency of our petitions.

It is not even a conclusion of law, for it does not advise us by what "measure of duty and of liability" he tested the findings of fact. How is this court to ascertain if he obeyed its mandate and applied the correct measure of liability?

The view most favorable to defendants would be that he considered the findings of fact insufficient to sustain the judgments. Yet this assumption is unnecessary to reach his conclusion, for, as we have shown, the opinion is based on the proposition that the petitions do not state a cause of action. Hence, although the findings of fact were in themselves quite sufficient, this would not supply the basic defect which, it was assumed, existed in the petitions.

But granting, for the sake of argument, that the State Supreme Court decided the findings of facts were insufficient to sustain the judgments, this court will go no further than to examine those findings to determine that question. It will not weigh the evidence to ascertain if it supports the findings of ultimate fact.

As was said in *Tyng vs. Grinnell*, 92 U. S., 467:

"A special finding by the court upon issues of fact, where parties or their attorneys have duly filed a stipulation, waiving a jury, has the same effect as a verdict and is not subject to review by this court, except as to the sufficiency of the facts found to support the judgment."

And if we were to go further still and assume that Judge Letton decided that the evidence did not sustain the findings, this would not be a finding of fact, but a conclusion of law as to the legal effect of the evidence, and this court would not

weigh the evidence to determine its preponderance, but would look to the record to see only if the evidence, with all the inferences that could justifiably be drawn from it, were sufficient to support the findings. In other words, it would re-examine the matter according to the rules of the common law.

"The jury have no power to render a verdict wholly unsustained by legal evidence (*Hammond vs. Jewett*, 22 Nebr., 363, cited), and whether there is any such evidence to support it is a question of law reviewable in the appellate court."

2 Eneye. Pl. & Prac., 404.

A refusal to find a fact which is supported by undisputed evidence, or a finding of fact unsupported by any evidence tending to establish it, is also reviewable as a question of law.

2 Eneye. Plead. and Prac., 407.

Alexandre vs. Machan, 147 U. S., 72; 13 Sup. Ct. Rep., 211.

Bedlow vs. New York Floating Dry Dock Co., 112 N. Y., 263; 2 L. R. A., 629.

Phenix Ins. Co. vs. Kerr, 129 Fed., 723; 66 L. R. A., 569.

"The power of the court to grant a new trial if, in its judgment, the jury have misinterpreted the instructions as to the rules of law, or misapplied them, is unquestioned, as also when it appears that there was no real evidence in support of any essential fact. These things obtained at the common law; they do not trespass upon the prerogative of the jury to determine all questions of fact."

Mr. Justice Brewer in *Walker vs. New Mexico & S. P. R. Co.*, 165 U. S., 593, 596; 17 Sup. Ct., 421, quoted by Mr. Justice Van Devanter in *Slocum vs. N. Y. Life Ins. Co.*, 228 U. S., 364; 33 Sup. Ct., 523, 529.

In *Laing vs. Rigney*, 160 U. S., 531; 16 Sup. Ct., 366, 368, Mr. Justice Shiras said:

"It is well established that exceptions to alleged findings of fact, because unsupported by the evidence, present questions of law reviewable in courts of error."

IV.

THIS COURT WILL ACCEPT THE FINDINGS OF FACT OF THE TRIAL COURT AND REVIEW THE CASES SOLELY FOR ERRORS OF LAW.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Seventh Amendment to the Constitution of the United States.

"This provision applies equally to a case tried before a jury in a State court and brought thence before a Federal court."

The Justices *vs.* Murray, 9 Wallace, 274.

Maxwell *vs.* Dow, 176 U. S., 581; 20 Sup. Ct. Rep., 448, 494, and cases there cited.

And it applies with equal force where, in a law case, a jury is waived and the issues of fact are tried by the court.

Craig *vs.* State of Missouri, 4 Peters, 410.

Republican River Bridge Co. *vs.* Kans. Pac. Ry. Co., 92 U. S., 315.

The scope of review under the Seventh Amendment is limited to "the granting of a new trial by the court where the issue was tried or to which the record was properly returnable, or the award of a *venire facias de novo* by an appellate court for some error of law which intervened in the proceedings."

Parsons *vs.* Nedford, 3 Peters, 441, 448.

As was said in *Republican River Bridge Co. vs. Kans. Pac. Ry. Co.*, *supra*, on page 317:

"In cases where the facts are submitted to a jury and are passed upon by the verdict, in a common-law action, this court has the same inability to review those facts coming from a State court that it has in a case coming from a circuit court of the United States.

"This conclusiveness of the facts found extends to the finding by a State court to whom they have been submitted by waiving a jury, or to a referee, where they are so held by State laws, as well as to the verdict of a jury."

Boggs vs. The Merced Mining Co., 3 Wall., 304.

In *Chicago, B. & Q. R. R. Co. vs. City of Chicago*, 166 U. S., 226; 17 S. Ct. Rep., 581, the City of Chicago, by condemnation proceedings, extended its street across the right of way of the railroad company. The question of damages was tried to a jury and resulted in a verdict for \$1.00, and final judgment was rendered in execution of the award by the jury. The judgment was affirmed by the Supreme Court of Illinois and came to this court on a writ of error.

The principal contention of the railroad company was that the opening of a street across its right of way and awarding compensation of \$1.00 deprived it of its property without due process of law, contrary to the prohibition of the Fourteenth Amendment. The syllabus (par. 6) is as follows:

"Where a State statute authorizing condemnation proceedings gives the property owner a right of jury trial, the Federal Supreme Court, in reviewing a judgment of the highest court of the State, affirming a judgment of condemnation, cannot, under the Seventh Amendment, re-examine any facts tried by the jury, otherwise than according to the rules of the common law. Therefore, even when the Supreme Court is of opinion that, in view of the evidence, the jury erred in finding that no property right of substantial value has been taken, it cannot, on that

ground re-examine the judgment. It can only inquire whether the trial court prescribed any rule for the guidance of the jury that was in absolute disregard of the right to compensation."

In the opinion Mr. Justice Harlan, after stating "it was for the jury to determine the facts," says (p. 587):

"Whatever may have been the power of the trial court to set aside the verdict as not awarding just compensation, or the authority of the Supreme Court of Illinois, under the constitution and laws of the State, to review the facts, can this court go behind the final judgment of the State court for the purpose of re-examining and weighing the evidence, and of determining whether upon the facts, the jury erred in not returning a verdict in favor of the railroad company for a larger sum than one dollar? This question may be considered in two aspects: First, with reference to the Seventh Amendment of the Constitution, providing that 'in suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law;' second, with reference to the statute (Rev. Stat., sec. 709), which provides that the final judgment of the highest court of a State in certain named cases may be re-examined in this court upon writ of error.

"It is clear that the last clause of the Seventh Amendment is not restricted in its application to suits at common law tried before juries in the courts of the United States. It applies equally to a case tried before a jury in a State court and brought here by writ of error from the highest court of the State. One of the objections made to the acceptance of the Constitution as it came from the hands of the Convention of 1787 was that it did not in express words preserve the right of trial by jury, and that, under it, facts tried by a jury could be re-examined by the courts of the United States, otherwise than according to the rules of the common law. The Seventh Amendment was intended to meet these objections, and to deprive

the courts of the United States of any such authority. It could not have been intended thus to restrict the power of the courts of the United States to re-examine facts tried by juries in the courts of the Union, and leave it open for these courts to re-examine, in disregard to the rules of the common law, facts tried by juries impaneled in the State courts, in cases which, by reason of the questions involved in them, could be brought under the cognizance of the courts of the United States."

In other words, this court must accept the facts as found by the jury and cannot re-examine them otherwise than according to the rules of the common law.

It is immaterial whether the State Supreme Court reversed or affirmed the court below. If the point raised in this court is that the evidence does not support the verdict, this court will examine the record, not to determine the preponderance of the evidence, but to ascertain if there be any evidence to support the verdict, and that regardless of whether the State Supreme Court held it sufficient or not, for the State court's conclusion as to its sufficiency is a question of law reviewable in this court and not a finding of fact.

"The verdict of the jury settles all questions of fact on a writ of error from the United States Supreme Court to a State court."

Smiley vs. Kansas, 196 U. S., 447; 25 Sup. Ct. Rep., 289.

"Much was said at the bar about the finding of the jury being against the evidence. We cannot enter upon such an inquiry. The facts must be taken as found by the jury, and this court can only consider whether the statute as interpreted to the jury was in violation of the Federal Constitution."

Missouri, K. & T. R. R. Co. vs. Haber, 169 U. S., 613; 18 Sup. Ct. Rep., 488-498.

"The facts, and the conclusions to be drawn from them, are for the jury, and cannot be reviewed by

the Federal Supreme Court upon writ of error" (Syllabus, par. #4).

Standard Oil Co. vs. Brown, 218 U. S., 78: 30
Sup. Ct. Rep., 669.

"When a trial by jury has been had in an action at law, in a court either of the United States or of a State, the facts there tried and decided cannot be re-examined in any court of the United States, otherwise than according to the rules of the common law of England."

Mr. Justice Gray in Capital Traction Co. vs. Hof, 174 U. S., 1; 19 Sup. Ct., 580.

V.

IF, THEREFORE, THE PETITIONS AND FINDINGS OF FACT OF THE TRIAL COURT SUSTAIN THE JUDGMENTS, THE DECISIONS OF THE TRIAL COURT SHOULD BE AFFIRMED.

If our preceding contentions are correct, this must follow.

The opinions of the State Supreme Court and the judgments of reversal are conclusive that that court reviewed the cases for errors of law and did not assume to retry questions of fact.

This court, therefore, accepts the facts—the ultimate conclusions of fact—as found by the trial court, and if those findings and the petitions are sufficient to sustain the judgments, then the trial court was right, and its judgments should be affirmed.

The result would not be different, if the court should conclude that the decision of the State Supreme Court was equivalent to saying that the evidence was insufficient to sustain the findings. That, as we have pointed out, would be a conclusion of law as to the legal effect of the evidence, and, as such, reviewable on writ of error.

The issue would be the same as though the cases had actually been tried to a jury, and the point raised was

whether the evidence supported the verdict. In such a case this court would not weigh the testimony to determine its preponderance, but would examine the record to ascertain if the evidence, with all inferences the jury could justifiably draw from it, were sufficient to support the verdict.

In principle the issue would be the same whether the State Supreme Court affirmed or reversed the judgment of the court below. In neither case would its judgment be a determination of a question of fact, but a decision in matter of law, reviewable here on error. The unsuccessful litigant would be entitled to a review of that question in this court if it involved a Federal right asserted below.

And, of course, the findings of fact of a trial court, in an action at law where a jury is waived, come to this court with the same quality of finality as the verdict of a jury, and can only be re-examined according to the rules of the common law.

If it be contended that a decision that "a case has not been made" is to say that the evidence does not sustain the findings or judgments, the question still remains one of law. That issue should properly be presented in the trial court by motion for a directed verdict or in arrest of judgment, and the ruling thereon would be reviewable on error.

In no aspect could it be viewed as a finding of facts, for that would require an affirmative statement of facts found. The quoted clause ("a case has not been made") is a mere negative statement.

It does not disclose what essential elements are wanting, nor yet by what rule of liability the sufficiency of the evidence was tested.

Whatever else it may be, it certainly is not a finding of facts.

To us it is inconceivable how any other view of the issues is possible.

However, should this court hold otherwise, it will be necessary to "analyze the facts in order to determine, whether that which purports to be a finding of fact is so interwoven

with the Federal question as to be in substance a decision of that question."

Norfolk & Western Ry. Co. *vs.* Conley, 236 U. S., 605; 35 Sup. Ct., 437, and cases cited.

In this case the Circuit Court of Kanawha County (West Va.) had, by its decree, held that the rate of fare for passengers on railroads, established by the legislature, "was not confiscatory *in fact* as to plaintiff in error."

There were no special findings. Application for appeal to the State Supreme Court was disallowed; whereupon writ of error was sued out of this court.

In the opinion Mr. Justice Hughes says:

"So far as findings are concerned, we have in the present case simply a general, or ultimate, conclusion of fact, which is set forth in the decree of the State court; and it is necessary for us, in passing upon the Federal right which the plaintiff in error asserted, to analyze the facts in order to determine whether that which purports to be a finding of fact is so interwoven with the question of law as to be in substance a decision of the latter."

It is to be observed that the court below had held in its decree that the rate in question "was not *in fact* confiscatory," while there is nothing in the opinion of Letton, J., which even resembles a question of fact—much less in the judgment of reversal.

But, whatever scope the review may take, there can be but one result. The decision of the State Supreme Court is so palpably erroneous it cannot stand.

Respectfully submitted,

JOHN JACOB THOMAS,
For Plaintiffs in Error.

Jan'y, 1916.



MAR 27 1915
JAMES O. WAHER

IN THE
SUPREME COURT
OF THE
UNITED STATES

October Term, 1914.

JONES NATIONAL BANK,
PLAINTIFF IN ERROR,
VS.
CHARLES E. YATES, ET AL.

October Term 1914
General Number

1

BANK OF STAPLEHURST,
PLAINTIFF IN ERROR,
VS.
CHARLES E. YATES, ET AL.

October Term 1914
General Number

10

UTICA BANK,
PLAINTIFF IN ERROR,
VS.
CHARLES E. YATES, ET AL.

October Term 1914
General Number

10

THOMAS BAILEY,
PLAINTIFF IN ERROR,
VS.
CHARLES E. YATES, ET AL.

October Term 1914
General Number

10

ERROR TO THE SUPREME COURT OF NEBRASKA.

BRIEF FOR DEFENDANTS IN ERROR, YATES AND HAMER.

FRANK M. HALL and FRANK E. BISHOP.

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IN THE
SUPREME COURT
OF THE
UNITED STATES

October Term, 1914.

JONES NATIONAL BANK,
PLAINTIFF IN ERROR,

VS.

CHARLES E. YATES, D. E. THOMP-
SON, LOUISA HAMER, *Administra-
trix of Estate of Ellis P. Hamer,
Deceased*, DEFENDANTS IN ERROR.

October Term 1914 No. 501
General Number 24240

BANK OF STAPLEHURST,
PLAINTIFF IN ERROR,

VS.

CHARLES E. YATES, D. E. THOMP-
SON, LOUISA HAMER, *Administra-
trix of Estate of Ellis P. Hamer,
Deceased*, DEFENDANTS IN ERROR.

October Term 1914 No. 502
General Number 24241

UTICA BANK,
PLAINTIFF IN ERROR,

VS.

CHARLES E. YATES, LOUISA HAMER,
*Administratrix of Estate of Ellis
P. Hamer, Deceased*,
DEFENDANTS IN ERROR.

October Term 1914 No. 503
General Number 24242

THOMAS BAILEY,
PLAINTIFF IN ERROR,

VS.

CHARLES E. YATES, LOUISA HAMER,
*Administratrix of Estate of Ellis
P. Hamer, Deceased*,
DEFENDANTS IN ERROR.

October Term 1914 No. 504
General Number 24243

ERROR TO THE SUPREME COURT OF NEBRASKA.

BRIEF FOR DEFENDANTS IN ERROR, YATES AND HAMER.

STATEMENT OF CASES.

The writs of error addressed to the supreme court of the state of Nebraska in these four cases, present for review the judgments and decision of the Nebraska supreme court, which on full review of the proceedings and evidence decided and adjudged that the petitions failed to allege a cause of action against the defendants, and plaintiffs failed to prove that the defendants were liable to the plaintiffs and reversed the judgments which had been rendered against the defendants in the trial court and dismissed the actions. The plaintiffs in error were plaintiffs in the trial court, and the defendants were Charles E. Yates and Louisa Hamer, administratrix of the estate of Ellis P. Hamer, deceased, in all four cases for whom we appear and present this brief. The action is in each of the cases by plaintiff to recover against the defendants who were directors of the Capital National Bank of Lincoln, Nebraska, which failed on January 21, 1893, the amount of deposits lost by the plaintiffs in the failure of that bank. The petitions are the result of numberless amendments and additions of verbiage to the assertions of failure of duty and violation of both the common law and the provisions of the national bank act on the part of the defendants resulting, it is alleged, in the loss of deposits.

The cases were tried by the district court of Seward county, Nebraska, where the parties waived trial by jury. An immense record of evidence was taken amounting to more than two thousand pages of testimony and exhibits, upon which the trial court made various, inconsistent, and unsupported findings of fact and of law, resulting in a judgment in favor of the plaintiffs against these defendants for the amount of their deposits, interest and costs. This trial was nominally in pursuance of the mandate and decision of this court in the same cases, under the title of *Yates, et al., v. Jones National Bank*, reported in 206 U. S. at 158 and 181, which had reversed judgments of the trial and supreme court of Nebraska rendered at a former trial against these defendants for the same loss. *Jones National Bank v. Yates, et al.*, 74 Neb. 734.

The Nebraska supreme court in rendering the present judgments acted with the fullest liberty of consideration and authority for adjudication of the full merits of these cases upon the pleadings and the evidence as a whole, under chapter 18, article 2, section 640, of the Revised Statutes of Nebraska 1913, which provides:

"When a judgment or final order shall be reversed, either in whole or in part, in the supreme court, the court reversing the same shall proceed to render such judgment as the court below have rendered or remand the cause to the court below for such judgment. * * *

Under this statute the state supreme court exercised two distinct functions, first as a court of errors to determine whether the judgments were dependent upon errors at the trial sufficient to reverse, and second to constitute itself a trial court in order to render such judgment as the initial trial court should have rendered, rather than to return the cases to the trial court for that or any other judgment.

In its second function it proceeded to a complete and unlimited investigation of the pleadings, evidence and merits not only of the judgments but of the cases, and on the complete investigation rendered its original and independent judgment based on its own findings both of fact and of law, independent of the trial court. In its investigation of the whole record as a trial court, it expressly and manifestly followed and applied the provision of the bank act, especially sections 5239 and 5147, concerning directors' liability and their obligation under the oath according to the construction given those provisions in the former judgment of this court. The state supreme court in exercising this power to proceed as a trial court evidences the manifest purpose of observing strictly and abiding by the provisions of the act exactly as they were construed and enforced by this court in order to furnish no occasion for further mistake in the enforcement of the provisions of the national bank act in these cases and in order to terminate correctly this litigation which has lasted nearly a generation.

The plaintiffs claimed they were deceived by the false statements in the reports made and published by the executive officers of the bank and attested by some or all of the defendant directors, whereby they either made or maintained their deposits in the bank up to the time of its failure. Amendments intended to modify this claim, were made to the petitions at the trial. Considering the amendments and the new testimony as well as that given at the former trials, the Nebraska supreme court made its findings of fact and of law, which are the basis of its decision reversing the judgments and dismissing the actions. The Nebraska court in *Jones Bk. v. Yates*, 93 Neb. 121, Trans., p. 49,* said:

"The amendments contained no material additional statements of fact, and the petitions still charge the defendants with making false statements to the comptroller of the currency as to the condition of the Capital National Bank, and this is the main foundation or basis for recovery. By the amendments, plaintiffs attempt to charge that the defendants knowingly and fraudulently and with the intent to deceive the plaintiffs, made such statements, and that thereby they induced the plaintiffs to become depositors in the Capital National Bank. To the petitions thus amended, each of the defendants demurred, the demurrers were overruled and the defendants excepted. It is probable that the demurrers should have been sustained."

The Nebraska supreme court further said (p. 125):

"Coming now to the consideration of the additional evidence, introduced upon the second trial of these cases, we are of opinion that it is insufficient to charge the defendants with a personal liability for fraud and deceit. The testimony is clear and practically without dispute that neither defendants Yates or Hamer signed the reports of December 9, 1892, and December 28, 1886, which are the ones upon which this action is in fact predicated, and neither of them had any personal knowledge of their falsity but signed them in good faith believing that they exhibited the true condition of the Capital National Bank. It is not shown that either Mr. Yates or Mr. Hamer ever had any communication or conversation with the plaintiffs or any of them in regard to the condition of the Capital National Bank. It is not shown that they or either of them had any knowledge that any published

*References apply to the Jones Transcript.

statements or cards containing any information as to the condition of the bank, were ever sent to the plaintiffs or any of them by any officer or agent of the bank. It follows therefore that the evidence is insufficient to charge them or either of them with ever having knowingly made any false statements in regard to the condition of the bank or participated in sending any advertising matter, published statements or any of the things mentioned in the plaintiffs' petition to them, or any of them; and having taken no part in such transaction it cannot be said that they knowingly participated in any of them. There being nothing in the record sufficient to bring defendants Yates and Hamer within the rule of liability announced by the supreme court of the United States in these cases and the others, we are of opinion that the judgment as to them, must be reversed."

As to following and applying the federal statutory liability and the former decision of this court, the Nebraska court said (p. 126):

"As we view the opinion of the supreme court of the United States in *Yates v. Jones Bank*, there was required in this case of the directors of the bank only that standard of conduct expressly imposed by section 5239 of the Revised Statutes of the United States, and no higher duty may be rightfully established and demanded. * *

* * The opinion of Justice White in the Yates case is based on a single proposition; that is: 'Where a statute creates a duty and prescribes a penalty for non-performance, the rule prescribed in the statute is the exclusive test of liability.' * * * At page 130, the plaintiffs having failed to allege and prove that the defendants personally knew of or personally participated in the acts of the officers of the bank of which they now complain, it seems clear that if we follow the decision of the supreme court of the United States in these cases, they are not entitled to recover and the judgments of the district court should be reversed as to all of the defendants."

Concurring with this judgment and decision Judge Letton said (p. 131):

"The presumption is that they (the findings of the trial court), are so sustained; but I have not examined the evidence so critically as would be necessary to determine this, for the reason that under the holding of the supreme court of the United States as to the measure of duty and of liability of directors under the banking laws of the United States, I think a case has not been made. For that reason alone, I concur in the conclusion."

This brief statement of the cases is made in order chiefly to present the argument of defendants in error to dismiss this writ or affirm the judgments of the Nebraska supreme court on the grounds: (1) that this court is bound by and has no jurisdiction to review or re-examine the findings of fact of the state supreme court that these defendants did not knowingly attest or permit to be made and published false statements of the financial condition of the Capital National Bank and did not knowingly violate nor participate in the violation of any of the provisions of the national bank act. And (2) that this court cannot proceed to a review of those findings of fact nor of the evidence generally upon the printed records here presented because it shows by mere inspection that it contains only selected favorable portions of a much larger bill of exceptions and does not pretend to contain all the evidence and testimony upon which the state supreme court passed and considered in making its findings and conclusions of fact to which it applied the rule of liability established by the bank act as construed by this court in its former judgment and mandate in these same cases.

STATEMENT OF POINTS DISCUSSED.

1. The findings of the state court are not subject to review in this court.

Dower v. Richards, 151 U. S. 658.

Miedreich v. Lauenstein, 232 U. S. 236.

2. Printed bill of exceptions does not contain all of the evidence and cannot be re-examined to change the findings of fact.

Yates v. Jones National Bank, 206 U. S. 158.

Kans. C. Co. v. Albers Co., 223 U. S. 573.

Creswell v. Knights, 225 U. S. 246.

So. Pac. Co. v. Schuyler, 227 U. S. 601.

Carlson v. Curtiss, 234 U. S. 103.

U. S. v. Copper Co., 185 U. S. 495.

Kinney v. U. S. Co., 222 U. S. 283.

Grand Trunk v. Cummings, 106 U. S. 283.

3. The judgment of the state supreme court upon the vote of the four judges does not deny the plaintiffs any federal right and the motion for rehearing with only three judges in its favor must fail for lack of majority of the court and is not reviewable in this court.

Shumway v. State, 82 Neb. 152.

Consolidated Co. v. Norfolk, 228 U. S. 230.

Ia. Central Co. v. Ia., 160 U. S. 389.

West v. Louisiana, 194 U. S. 258.

King v. West Va., 216 U. S. 92.

Carmichael v. Eberle, 177 U. S. 63.

4. The petitions do not state a cause of action against the defendants.

Yates v. Jones National Bank, 206 U. S. 158.

5. Section 5239 of the bank act requires a knowing violation of its provision in order to establish liability.

McDonald v. Williams, 174 U. S. 397.

Potter v. Hill 155 Mo. 232.

Utely v. Hill, 155 Mo. 232.

Mason v. Moore, 79 N. E. 932.

Spurr v. U. S., 161 U. S. 728.

Rosen v. U. S., 161 U. S. 29.

So. Company v. Silva, 125 U. S. 247.

Thomas v. Taylor, 224 U. S. 73.

6. The directors of a national bank are not obliged to manage but to administer its affairs and are not responsible for the acts of its officers and agents which they did not knowingly participate in or assent to.

Briggs v. Spaulding, 141 U. S. at 162.

7. The director does not attest the official report at his risk of its being false. He is not responsible without knowledge of its falsity.

Yates v. Jones Bank, 206 U. S. 179.

Briggs v. Spaulding, 141 U. S. 147.

8. Nebraska supreme court correctly understood and applied the rule of liability of directors derived from the national bank act to the evidence.

Yates v. Jones Bank, 93 Neb. 121.

**POINT A—FACTS FOUND BY THE STATE COURT NOT
REVIEWABLE.**

The Findings of Fact as to These Defendants Not Having Knowledge of Any Falsity of the Reports and Not Participating in Any Violation of the Bank Act Are Binding Upon This Court and Not Subject to Its Review.

We think there can be no question that the findings and conclusion of the Nebraska supreme court, upon a full consideration of the extensive bill of exceptions containing all the evidence in these cases, are findings of fact, which are not subject to review or re-examination by this court. In the small compass of an opinion (Trans., p. 49), it was impracticable to set out the complicated testimony and exhibits from which the court found and concluded; that the whole evidence is insufficient to charge the defendants with personal liability for fraud and deceit; that defendants, Yates and Hamer, when they signed the two reports which are the foundation of the action, neither had personal knowledge of their falsity but signed them in good faith believing they exhibited the true condition of the bank; that they never had any communication with the plaintiffs regarding the bank; never made any false statements in regard to its condition or participated in sending any such statement to the plaintiffs and having taken no part in such transaction it cannot be said they knowingly participated in them, and there is nothing in the record sufficient to bring defendants, Yates and Hamer, within the rule of liability announced by the United States supreme court; and that plaintiffs have failed to allege and prove that the defendants personally knew of or personally participated in the acts of officers of the bank of which they complain. These findings of act form ample and substantial basis for the judgment dismissing the actions. They cover the essential elements

on which liability must depend and from which non-liability must result. We do not think these are commingled findings of law and of fact. The court has carefully discussed the rule of law established in the former decision of these cases by this court and has laboriously and faithfully endeavored to follow and apply the provisions of the bank act to the facts found as prescribed by this court in its mandate. We have referred particularly to the opinion, but the syllabus states the conclusion of law and in substance the findings of fact as conclusively, and has very much the same force as the opinion because the syllabus is made and approved by the court. Notwithstanding the aberration of Judge Letton in his concurring opinion concerning the common law character of the cause of action stated, his vote is cast for reversal and dismissal directly upon the failure of the plaintiffs to sustain the burden of proving the knowledge of the falsity of the reports and the wrongful participation of the defendants in violation of the banking act, for in 93 Neb. 131 (Trans., p. 55), he says:

"Under the holding of the supreme court of the United States as to the measure of duty and of liability of directors under the banking laws of the United States, I think a case has not been made."

So that four out of the six judges who sat concurred in the findings of fact above emphasized, upon which they based their judgment of *no liability*. These findings we think are not subject to review here.

In *Dower v. Richards*, 151 U. S. 658, at 663 the state court of California had found that the lands in question were not valuable ore-bearing, at the time of the location of the town-site so far as was known, and this court said:

"The principal ground on which the plaintiffs in error seek to reverse the judgment of the supreme court of California is that its decision in matter of fact was erroneous and contrary to the weight of evidence in the case. But to review the decision of the state court upon the question of fact is not within the jurisdiction of this court. In the legislation of congress from the foundation of the government a writ of error which brings up matters of law only, has always been distinguished from an appeal which, unless expressly restricted, brings up both law and fact."

At page 671 :

"This conclusiveness of the facts found, extends to the finding by a state court to whom they have been submitted by waiving a jury, or to a referee where they are so held by state laws, as well as to the verdict of a jury."

This opinion contains a full discussion of this question.

In *Miedreich v. Launcestein*, 232 U. S. 236, at 243 Mr. Justice Day for the court, said :

"This court has repeatedly held that in cases coming to it from the supreme court of a state, it accepts as binding, the findings upon issues of fact duly made in that court."

POINT B—BILL OF EXCEPTIONS INADEQUATE.

The Printed Record in These Cases Does Not Present All of the Evidence Considered by the State Supreme Court But Only a Selected Portion of it From Which it Results That This Court Cannot Review or Re-examine the Evidence in Order to Test the Findings of Fact of the State Court Upon a Claimed Federal Right Under the Exceptions to the General Rule That This Court Will Review the Facts Where it is Claimed (1) That There is no Evidence to Sustain the Finding Upon the Federal Issue, or (2) That the Finding is Not Strictly One of Fact But a Mingled One of Law and Fact, or (3) That the State Court Has Refused to Find Facts Which Determine the Federal Question.

In these cases, the state supreme court was relieved from making any construction or determination of the federal question based on the rule of liability of the defendants under the national bank act. This had all been done in the construction given the act by this court in its former decision. In 206 U. S., at 177 this court said :

"As the section thus comprehends all the express commands to do or not to do as to directors, contained in the national bank act, and besides specifies the nature of the conduct of directors from which their civil liability for violation of such commands may arise, it results that liability cannot be entailed upon them by exacting a different and higher standard of conduct as regards such commands than that established by the statute, without

depriving directors of an immunity conferred upon them. That the words, 'shall knowingly violate or knowingly permit,' etc., found in the first sentence of section 5239, Rev. Stat., were intended to express the rule of conduct which the statute established, as a prerequisite to the liability of directors for a violation of the express provisions of the title relating to national banks, is additionally shown by the oath which a director is required to take, wherein as already stated, he swears, "that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association and will not knowingly violate or willingly permit to be violated any of the provisions of this title." Mark the contrast between the general common law duty to 'diligently and honestly administer the affairs of the association' and the distinct emphasis embodied in the promise not to 'knowingly violate or willingly permit to be violated any of the provisions of this title.' In other words as the statute does not relieve the directors from the common law duty to be honest and diligent, the oath exacted responds to such requirements. But as on the other hand the statute imposes certain express duties and makes a knowing violation of such commands the test of civil liability, the oath in this regard also conforms to the requirements of the statute by the promise not to 'knowingly violate or willingly permit to be violated, any of the provisions of this title.' * * * (p. 179). The civil liability of national bank directors then in respect to the making and publishing of the official reports of the condition of the bank, a duty solely enjoined by the statute, being governed by the national bank act, it is self evident that the rule expressed by the statute is exclusive because of the elementary principle that where a statute creates a duty and prescribes a penalty for non-performance the rule prescribed in the statute is the exclusive test of liability. * * * Indeed in one aspect, the ruling below went further than this, since it was in substance decided that despite the exercise of diligence by the director if he attested an untrue report, he was civilly liable because he did so at his risk since it was his duty to know or to refrain from acting. That this imposed a higher standard of conduct than was required by the statute is obvious but is clearly also established by previous decisions of this court pointing out that where by law a responsibility is made to arise from the violation of a statute knowingly, proof of something more than negligence is required, that is, that the violation must in effect be intentional."

The Nebraska supreme court may not have slavishly reiterated this language in every instance in its opinion, but it

has faithfully quoted and applied it to the essential facts found from the voluminous bill of exceptions of the evidence. Indeed it has been closely followed by the concurring and even the dissenting opinions. The difference between the judges arose simply from their analysis of the facts. We submit that no essential criticism can prevail against the application of the proper rule of liability derived from the statute as construed by this court as it was applied by the Nebraska supreme court to the facts, so that no federal question on the construction, force and effect of the statute is open for review on this record.

The essential and vital point is that on the partial printed record of the evidence here presented this court will not undertake to review the findings of fact of the state supreme court as if it came under any of the exceptions to the general rule above stated. It must be conceded by the plaintiffs in error, and can be demonstrated by a glance at the testimony in the printed record of Mr. Yates, Mr. Hamer and of Mr. Thompson and others, that these defendants did not knowingly attest and publish any statement of the condition of the bank which was false or untrue, and did not participate in or assent to any such misrepresentation. There is therefore ample evidence in the printed record to sustain the findings and judgment of the state supreme court dismissing the actions. If we are wrong in advocating that the findings of the state supreme court are binding upon this court and that the federal question is so presented as to require an examination of the evidence to determine the correctness of the findings of the state court, still this court will not proceed to that examination without every word of the testimony and evidence before it, for it cannot be presumed and no one would undertake to say that ample evidence did not remain in the bill of exceptions unprinted and consequently not before the court, which would sustain the findings of the state court. In all the cases which we have been able to examine where this court has undertaken to review the testimony, the opinions show clearly that all of the evidence is properly before the court and subject to its complete examination.

In the leading case of *Kansas City Co. v. Albers Co.*, 223 U. S. 573, where the state court had found that an agreed railroad rate must prevail as against the regularly published tariff rate, this court at page 591, on a motion to dismiss, said:

"While it is true, that upon a writ of error to a state court, we cannot review its decision upon pure questions of fact, but only upon questions of law bearing upon the federal right set up by the unsuccessful party, it equally is true *that we may examine the entire record including the evidence if properly incorporated therein*, to determine whether, what purports to be a finding upon questions of fact is so involved with and dependent upon such questions of law as to be in substance and effect, a decision of the latter."

And at page 594:

"When due regard is had for the rule before indicated and so often applied in other cases, it does not admit of doubt that in the present case, *we may examine the evidence which has been properly incorporated in the record*, to determine whether the general finding necessarily involved the decision of questions of law bearing upon the federal right set up by the garnishee."

In *Creswell v. Knights of Pythias*, 225 U. S. 246, at 261 this court said:

"As the inquiry which we thus state, rests upon the premise that all the propositions of law applied by the court are to be taken as correct, it follows that there is no possibility of deciding there was material error unless it is to be found in the application which the court made of the principle of law which it applied to the facts *established by the evidence, all of which is in the record in connection with the findings made by the jury*. While it is true that upon a writ of error to a state court we do not review findings of fact, nevertheless two propositions are as well settled as the rule itself, as follows: (a) that where a federal right has been denied as the result of a finding of fact, which it is contended there was no evidence whatever to support, *and the evidence is in the record*, the resulting question of law is open for decision."

In *Southern Pacific v. Schuyler*, 227 U. S. 601, at 611 the court said:

"And while it is conceded that ordinarily upon writ of error to a state court, this court does not review the findings of fact, yet it is insisted that in this case a

federal right has been denied as the result of a finding of fact which is without support in the evidence, *that the evidence is before us in the record* by which that insistence may be tested, etc., * * * accepting the duty to review this question of fact, *we have examined the evidence in the record* and find that it fairly supports the conclusion of the state court, that the deceased was accepted by the plaintiff in error as a gratuitous passenger."

In *Carlson v. Curtiss*, 234 U. S. 103, at 106 this court said:

"And just as this court, where its appellate jurisdiction is properly invoked, *and all the evidence is brought before it*, will, if necessary for a decision of a federal question, *examine the entire record* in order to determine whether there is evidence to support the findings of the state court, so it is our duty in the absence of adequate findings, to examine the evidence in order to determine what facts might reasonably be found therefrom, and which would furnish a basis for the asserted federal right."

It is well settled that the printed record presented to this court for review of the evidence must contain all of the evidence considered by the lower court derived from a bill of exceptions, which is properly certified and which does in fact contain all of the evidence. In *United States v. Copper Company*, 185 U. S. 495, the verdict in favor of the plaintiff was based on an instruction that Ross, who cut the timber, must be shown by the evidence to have been a citizen of the United States and a resident of Arizona. The plaintiff in error claimed there was no evidence to sustain either of these facts and demanded a review of the evidence. But the court (p. 497), said:

"It does not appear from the bill that it contains all the evidence given upon the trial. It may be that it does, but we cannot in the absence of any statement in the bill to that effect, presume it does for the purpose of reversing the judgment herein, upon the assumption that the proper construction of the act of congress requires such citizenship as well as residence. When this court is asked to reverse a judgment entered upon the verdict of a jury, upon a writ of error, upon the ground that there is absolutely no evidence to sustain it, and the court should have directed a verdict, the bill of exceptions must embody a statement or there must be a stipulation

of counsel declaring that the bill contains all the evidence given upon the trial, so that the record shall affirmatively show the fact. * * * However that may be, the record is in such a state that we cannot say that all the evidence given upon the trial is contained in the bill of exceptions and therefore we cannot say that there was no evidence of the residence and of the citizenship of Ross upon which the verdict of the jury might be sustained. If there were evidence that Ross was a citizen, and a *bona fide* resident, it is admitted that the verdict could not be disturbed by this court. There may have been evidence upon both propositions, sufficient to sustain the verdict."

Kinney v. U. S. Fidelity Co., 222 U. S. 283.

Grand Trunk v. Cummings, 106 U. S. 700.

We submit that upon the partial selection of only a portion of the testimony, the plaintiffs in error have no right to invoke the jurisdiction of this court to review the findings of fact of the state supreme court and cannot obtain a review of the evidence to determine either the validity of those findings, or a finding of this court that the defendants are as a matter of fact liable under the provisions of the national bank act. The assignments of error upon which the plaintiffs rely are so indefinite and inadequate that they do not raise the question of the proper construction and application of the provisions of the national bank act. The printed record is inadequate to review at all the supreme court findings of fact or the evidence upon which they are based, and the judgments must be affirmed on those findings.

POINT C—VALIDITY OF THE JUDGMENT OF THE STATE SUPREME COURT.

No Federal Right Was Set Up by the Plaintiff and Denied by the State Supreme Court in the Claim That the State Constitutional Majority of Four Judges Did Not Vote For the Judgment Which Reversed the Judgment of the Trial Court Against the Defendants and Dismissed the Actions.

Assignments of error numbers 22 and 23, and point 8 (Trans., p. 102, brief, p. 23), which allege that the findings and judgment of the state supreme court are not concurred in

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by the constitutional majority of four judges of the state supreme court, as required by the state constitution, whereby the plaintiffs have been deprived of property without due process of law, in violation of the 14th amendment to the federal constitution, and by which the state court still had jurisdiction of the judgments at the time of ruling on the motion for re-hearing when a majority of the court was not in favor of the judgment of reversal and dismissal, do not raise any federal question which was specially set up by the plaintiffs and ruled adversely to them by the state court, and consequently are not open to review now. This point is not argued but is made prominent in the statement and the court is requested to notice points aside from those argued.

The state constitution, article 6, section 2, provides:

"The supreme court shall consist of seven judges; and a majority or all elected and qualified judges shall be necessary to constitute a quorum or pronounce a judgment.

The compiled statutes of Nebraska, 1911, chapter 19, section 37, provides:

"A judge or justice is disqualified from acting as such except by mutual consent of parties, in any case wherein he is a party or interested, * * * or where he has been attorney for either party in the action or proceeding."

On January 31, 1913, the state court filed its opinion and rendered its judgment reversing the judgments of the trial court and dismissing these actions (Trans., pp. 48, 49.)

Yates v. Jones National Bank, 93 Neb. 121.

This final judgment of the state supreme court is certified under the seal of the court by its clerk as the judgment in these cases to reverse which the plaintiffs in error have sued out their writs in this court, (Trans., original, p. 251). Upon the face of the record, this judgment of the supreme court of Nebraska is the final and conclusive disposition of these cases which the plaintiffs in error recognize and admit by their error proceedings and which they have never assailed in the state court. Primarily and upon the record, that judg-

ment is conclusive upon the plaintiffs, and we think does not permit of review by this court as the record stands, both because the certified record before this court is conclusive of the judgment and proceedings of the state supreme court and because this court does not review the proceedings and manner of rendering judgment of the state supreme court according to their own constitution and statute.

One vital matter which deserves attention immediately is the claim that the concurring opinion of Letton, J., (Trans., p. 55) was only an approval of the law as declared by this court in its former judgment and was not a finding or concurrence by that judge in the findings of fact and the reversal of the judgments and dismissal of the actions so that only three judges it is claimed passed the judgment which is sought to be reviewed by these error proceedings. This claim is without foundation upon the face of the opinions and record. Judge Letton's concurring opinion will be found in 93 Neb. 130 (Trans., p. 55), at the end of which that judge says:

"But I have not examined the evidence so critically as would be necessary to determine this (whether or not the findings of the trial court were sustained by any evidence), for the reason that *under the holding of the supreme court of the United States as to the measure of duty and of liability of directors under the banking laws of the United States, I think a case has not been made.* For that reason alone I concur in the conclusion."

There can be no reasonable ground for dispute that Judge Letton intended, and expressed his intention to decide that, applying the test of liability fixed by the federal statute and the former decision of this court, to the evidence, a case had not been made in favor of the plaintiffs either as matter of law or matter of fact.

His decision and vote of concurrence in the judgment is directly upon the facts, so that beyond the possibility of dispute four judges out of the seven constituting the full court, voted for and rendered the judgment reversing the judgments of the trial court and dismissing the actions. These judgments have never been set aside, modified, or in any way affected by any subsequent proceeding in the state supreme court and

stand as matter of fact as well as matter of record, the final decision pronounced by the constitutional majority of the state supreme court.

After the judgment of the supreme court had been rendered, the plaintiffs duly filed a motion for re-hearing, which was retained by the court for a long while and on May 17, 1913, an order was entered for oral argument upon the motion for rehearing, which argument was duly held, and on January 8, 1914, the court entered an order showing on its face that Judges Barnes, Hamer and Rose voted against allowing the rehearing and Judges Letton, Sedgwick and Fawcett voted to allow a rehearing, and thereupon Chief Justice Reese voted in favor of allowing a rehearing and declared said motion to be carried. Whereupon the order for rehearing was entered (Trans., pp. 65, 66). At the same time there was filed the following protest:

"Hamer, Rose and Barnes, J.J. dissent from the order granting a rehearing herein and protest against the entry thereof on the journal of this court for the reason that it is void for want of a qualified constitutional majority to grant such a rehearing, the chief justice having been consulted by the plaintiff and having so announced when the case was on for hearing. *Shumway v. State*, 82 Neb. 152, 165."

It was made to appear beyond dispute (Trans., Rose affidavit, pp. 81-66, 94, 95; Staplehurst, Trans., affidavit, Bishop, p. 75), that the chief justice had stated from the bench when the cases were first presented to the court upon a motion to advance, that he had been consulted by one of the plaintiffs in these cases and expressed his opinion upon them and advised against bringing them, whereupon he withdrew from the court and left the cases to the remaining six judges, and on three or four subsequent occasions likewise withdrew, and never took any part in the trial or consideration of the cases. The defendants immediately moved to set aside the order allowing the rehearing and the order of May 17, 1913, which had ordered argument upon the motion for rehearing. Subsequently five judges of the six qualified to act in these cases voted to sustain the motion to set aside the order for rehearing (Trans.,

p. 92), and an appropriate order was entered setting aside the order granting the rehearing because the judges stood equally divided upon the motion for rehearing which worked a denial of the motion, *Shumway v. State*, 82 Neb. 152, 165. The original judgment of the court upon the original opinion of date January 31, 1913, stood unaffected and without modification by the approving vote of the four judges in the original instance and of the five judges to set aside the order granting a rehearing as void.

Here in the first instance it is important to note that the correctness and propriety of the proceedings upon the motion for rehearing were never challenged nor brought to the attention of the state supreme court upon any ground of denial of due process of law under the 14th amendment. It is therefore true that if the question were one appropriate for review here, it has not been specifically set up nor denied by the state supreme court as required by section 709, Rev. Stat. The first complaint against the procedure of the state court was made by plaintiffs, in their assignments of error filed coincident with their application for the present writs from this court. Even if this complaint had been made in a motion for rehearing, the federal right would not have been claimed because the state court never made any order or rendered any judgment on any such presentation of the claim of federal right adverse to that right. It is therefore manifest that within the rule as stated in *Consolidated Co. v. Norfolk Co.*, 228 U. S. 320, at 334, that no federal right has been presented to the state court and denied either by motion for rehearing, the assignments of error or otherwise.

There were ample grounds aside from any consideration of due process of law, for the state court sustaining the motion of the defendants to set aside the order granting the rehearing. The secret participation of the disqualified chief justice, with the other six judges was manifestly a departure from right professional ethics, was a direct violation of the statute of the state, and was a manifest disregard of fundamental ethics and of the judicial proposition that no man should sit in judgment

upon his own cause. The state supreme court splendidly vindicated its appreciation of the law and its courage to enforce it, when five out of six judges voted to hold the order passed by the disqualified vote of the chief justice null and void.

Where the state court has acted in compliance with general legal principles, has given the parties notice, opportunity to be heard, and an actual hearing according to the usual procedure of courts, no due process protected by the 14th amendment has been affected and we submit that the suggestion of error here is frivolous and so lacking in color of federal right as not to deserve consideration.

In *Iowa Central Co. v. Iowa*, 160 U. S. 389, it was alleged that due process was denied by a mandamus proceeding to compel the railroad company to operate a certain line without first having tried out to a jury, the right to compel the operation, but this court said, page 393:

"It is also equally evident provided the form sanctioned by the state law gives notice and affords an opportunity to be heard, that the mere question of whether it was by a motion or ordinary action, in no way rendered the proceeding not due process of law, within the constitutional meaning of these words. Whether the court of last resort of the state of Iowa properly construed its own constitution and laws in determining that the summary process under those laws was applicable to the matter which it adjudged, was purely the decision of a question of state law binding upon this court. Mere irregularities in the procedure, if any, were matters solely for the consideration of the judicial tribunal within the state empowered by the laws of the state to review and correct errors committed by its courts. Such errors affect merely matters of state law and practice, in no way depending upon the constitution of the United States or upon any act of congress. * * * It was not a denial of a right, protected by the constitution of the United States to refuse a jury trial even though it were clearly erroneous to construe the laws of the state as justifying the refusal."

West v. Louisiana, 194 U. S. 258.

King v. West Virginia, 216 U. S. 92, at 100.

Carmichael v. Eberle, 177 U. S. 63.

POINTS OF ARGUMENT.

In the re-constituted assignment of error, or the extraction of certain points of argument from the assignments of error, the plaintiffs have made their first point that the petitions stated a cause of action under the statute, or at common law.

POINT 1—THE PETITIONS.

If the Petitions State Any Cause of Action it is Based Upon the Two Official Reports of the Condition of the Bank Attached to the Petition, One For December 28, 1886, and the Other For December 9, 1892.

We think it is of no importance that the petitions are claimed to state causes of action equally under the bank act or at common law. It is true that the plaintiffs have studiously attempted to avoid any reference to the national character of the bank, that the reports attached to the petition were made to the comptroller and attested by some of the directors as directors of a national bank pursuant to the national bank act. In the early stages of the litigation this was done in order to prevent the exercise of the right to remove the cases to the federal courts by the defendants. In order to add another thread to their net, the plaintiffs also asserted that the defendants had made verbal statements of the condition of the bank to the plaintiffs and also sent printed slips representing the assets and liabilities of the bank, and also carried advertisements of its condition in the newspapers. It was thought by this method to establish a common law liability if none could be shown upon the two official reports. This claim is now abandoned in silence. As to the essential character of the petitions it is admitted by plaintiffs that it is an attempt to enforce liability provided under Sec. 5239, Rev. Stat., regardless of the subterfuges and evasions so laboriously repeated in the petitions. When the cases were in this court on the former writ, it was said (206 U. S., at p. 170) :

"It is not to be doubted that although the plaintiff alleged the making of false verbal and written statements, there was no attempt to establish any verbal misrepresentations. It is also certain even if it be conceded arguendo that there was some evidence tending to show the making of alleged written representations other than those contained in the official reports made by the association to the comptroller of the currency and published in conformity to the National Bank Act, *that such latter statements were counted upon in the amended petition and were if not exclusively, certain principally the grounds of the alleged false representations covered by the proof.*"

It was the petition itself, the character of the action which came to judgment and was held to be within the provision of the bank act rather than an action at common law for something entirely outside of the duties, functions and obligations of a national bank and of its directors. The state court in its opinion (93 Neb. 123), referring to the former judgment of this court said:

"It was held that plaintiffs' petitions were insufficient to charge the defendants with common law liability for fraud and deceit. * * * (p. 125) and unless the supreme court of the United States shall recede from its decision of these cases, the petitions will be held insufficient by that court to state a common law liability for fraud and deceit as against the defendants who were simply directors of the Capital National Bank."

And in the dissenting opinion at page 134:

"No action against the directors of a national bank for fraud and deceit at common law can be maintained. This was decided when these cases were formerly before the supreme court of the United States shall recede from its emphatically decided by that court and no such claim can be made in this case."

No change has been made in the petition which affects the adjudicated federal character of the cause of action attempted to be stated.

POINT 2—INTENTIONAL VIOLATION.

The Second Point For Argument That Section 5239 Does Not Contemplate an Intentional Violation, But a Violation in Effect Intentional to Incur Liability, and That There is in Effect Intentional Violation Where One Deliberately Refuses to Examine Where it is His Duty to Examine, Furnishes Absolutely no Ground Either in Law or in Fact to Discredit the Judgment of the State Supreme Court.

The supreme court found (93 Neb., p. 125):

"Coming now to the consideration of the additional evidence introduced upon the second trial of these cases, we are of opinion that it is insufficient to charge the defendants with a personal liability for fraud and deceit. The testimony is clear and practically without dispute that when defendants Yates and Hamer signed the reports of December 9, 1892, and December 28, 1886, which are the ones upon which the action is in fact predicated, neither of them had any personal knowledge of their falsity, but signed them in good faith believing that they exhibited the true condition of the Capital National Bank."

And page 130:

"The plaintiffs having failed to allege and prove that the defendants personally knew of or personally participated in the acts of the officers of the bank of which they now complain, it seems clear that, if we follow the decision of the supreme court of the United States in these cases they are not entitled to recover and the judgments should be reversed as to all of the defendants."

These are the specific findings of fact from the whole evidence made by the supreme court of the state in its combined power of a review court and a trial court and completely negatives the claim that there is in effect an intentional violation of the statute by defendants, Yates and Hamer, on the ground that they refused to examine where it was their duty. No definite claim is made as to what should be examined or in what respect they failed to perform their duty as directors to examine some or all of the books, business or finances of the bank. The former opinion of this court in these cases leaves no doubt that the statute requires proof of knowledge on the part of the director of the falsity of the reports made by the

bank itself, sworn to by its president or cashier, and afterwards attested by the directors in order to fix the liability created by section 5239 of the bank act, where the provision is that:

"If the directors shall knowingly violate, or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of this title. * * * then in case of such violation every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its share holders or any other person shall have sustained in consequence of such violation."

It has been adjudicated and become the law in these cases that the directors are liable only on proof that they knowingly violated some provision of the statute because the act requires *that* proof, and fixes the liability only upon *such* violation, and that they do not participate in or assent to any violation of the act without a conscious knowledge of the wrong or falsity. It was to characterize these inherent and essential elements of the statute that it was said:

"Proof of something more than negligence is required, that is that the violation must in effect be intentional."

This court, to illustrate such holdings, cited:

McDonald v. Williams, 174 U. S. 397.

Potter v. U. S., 155 U. S. 438, 446.

Utely v. Hill, 155 Mo. 232, 264.

Mason v. Moore, 79 N. E. (O.) 932.

In *McDonald v. Williams*, 174 U. S., at 406, this court said:

"The permitting to be withdrawn cannot be founded upon the simple receipt of a dividend under the facts stated above. *One is not usually said to permit an act which he is wholly ignorant of, nor would he be said to consent to an act of the commission of which he had no knowledge.* Ought it to be said that he withdraws or permits the withdrawal by ignorantly yet in entire good faith receiving his proportionate share of the dividend? Is each share holder an absolute insurer that dividends are paid out of profits? Must he employ experts to examine the books of the bank previous to receiving each dividend? Few shareholders could make such examination themselves. The shareholder takes the fact that a

dividend has been declared as an assurance that it was declared out of profits and not out of capital, because he knows that the statute prohibits any declaration of a dividend out of capital. Knowing that a dividend from capital would be illegal he would receive the dividend as an assurance that the bank was in a prosperous condition and with unimpaired capital. Under such circumstances we cannot think that congress intended by the use of the expression "withdraw or permit to be withdrawn, either in the form of dividends, or otherwise," any portion of its capital, to include the case of the passive receipt of a dividend by a shareholders in the bona fide belief that the dividend was paid out of profits, while the bank was in fact solvent."

In *Spurr v. U. S.*, 174 U. S. 728, the conviction was for certifying a check against an inadequate account in violation of Sec. 5207, Rev. Stat. U. S.:

"It shall be unlawful for any officer * * * of any national bank to certify any check * * * unless the person drawing the check has on deposit at the time, * * * an amount of money equal to the amount specified in such check."

The court said (p. 733):

"The questions for determination were defendant's knowledge of the state of D's account when the checks were certified, and his intent in the certifications. * * * (p. 734) In *Felton v. U. S.*, 96 U. S. 699, it was said: 'Doing or omitting to do a thing knowingly and wilfully, implies not only a *knowledge of the thing*, but a determination with a bad intent to do it or to omit doing it. * * *' (p. 735) The defense was that defendant had no actual knowledge that D. had not sufficient funds in the bank to meet the checks, nor knowledge of facts putting him on inquiry; that on the contrary he believed that they had such funds; that this belief was founded on information he received from the cashier or the exchange clerk, the proper sources of information, in response to inquiries which he made in each instance, before he certified; that he honestly relied on that information and that he had the right to do so. Defendant was entitled to the full benefit of this defense and in order to that, it was vital that the meaning of 'wilful violation' as used in the act * * * should be clearly explained to the jury."

In *Rosen v. U. S.*, 161 U. S. 29, at 33, the indictment was for unlawfully, wilfully and knowingly depositing in the post office certain obscene paper, which:

"May not unreasonably be construed as meaning that the defendant was and must have been aware of the nature of its contents at the time he caused it to be put into the postoffice for transmission and delivery. * * * He must have understood from the words of the indictment that the government imputed to him knowledge or notice of the contents of the paper so deposited. In their ordinary acceptation the words unlawfully, wilfully and knowingly, when applied to an act or thing done, import knowledge of the act or thing so done as well as an evil intent or bad purpose in doing such thing; and when used in an indictment * * * could not have been construed as applying to the mere depositing in the mail of a paper, the contents of which at the time, were wholly unknown to the person depositing it."

In *So. Company v. Silva*, 125 U. S. 247, at 257, the court said:

"The question is, did Silva know of their existence (plugged drill holes in a mine) at the time he sold the mine, and having such knowledge, did he falsely represent to the complainant that he knew nothing of them, thereby inducing complainant to act upon such representations. * * * There is no direct evidence going to show who drilled the holes and there is nothing in the entire record to connect Silva with them except the fact that he was the owner of the mine and was in possession of it at a time when it is most likely they were drilled. But this circumstance alone should not outweigh the positive denial of Silva in his answer and also his equally positive denial in his testimony, of his knowledge of the existence of said drilled holes. The law raises no presumption of knowledge of falsity from the single fact *per se* that the representation was false. There must be something further to establish defendant's knowledge. * * * This rule is fortified by the consideration that had he known of the limited quantity of ore in and about the ore chamber, Silva would hardly have gone to the expense and labor of starting a drift from the bottom of winze No. 1, and constructing it for a certain distance, before the sale of the mine, for the purpose of reaching the supposed downward extension of the ore in and about that chamber. Knowing that the ore body terminated within a few inches of the surface of the chamber, and then in the face of that knowledge actually constructing a drift on the 82-foot level, at enormous expense, for the purpose of getting under that limited quantity of ore, would not appear a reasonable thing to do by any one, especially by such an experienced and practical miner as Silva is admitted to have been."

The claim that there is an intentional violation when one deliberately refuses to examine where it is his duty to examine, is based upon but is a distortion of some language in *Thomas v. Taylor*, 224 U. S. 73. In that case it was stipulated by the parties:

"That at least thirty days prior to the 28th day of March, 1904, the comptroller of the currency had called the attention of the directors of the bank by letter to the situation of the bank and that items amounting to \$194,107.02 must be regarded as doubtful assets and that immediate steps should be taken to collect them or remove them out of the bank; and that defendants had knowledge of such letter from the comptroller of the currency at the time that they attested the report. That of the \$194,107.02 above referred to, \$97,000 never has been realized."

Same case, 106 N. Y. Supp. 538, 195 N. Y. 590, 89 N. E. 1113.

The letter referred to certain specied assets. The report was called for, made, and attested by the directors as to the condition of the bank on March 28, 1904, and contained all of the doubtful assets referred to. On June 27, 1904, an assessment was made on the stockholders to make good the loss of half of the doubtful assets specified. This court, in referring to the opinion of the appellate division of the New York court reported, *Thomas v. Taylor*, 108 N. Y. Supp. 454, in 224 U. S., p. 81, said:

"The complaint charges plaintiffs in error, with actual knowledge. The allegation is that when plaintiffs in error attested the report 'they knew the same was not correct and was false, and said statement was thus attested by them with the intention of deceiving the public, and among others, the plaintiff' (defendant in error). And the appellate division says (p. 56): '*That the report was false and known to the defendants to be false they do not deny, nor do they attempt to explain their conduct.*' This would seem like a finding of fact of knowledge of the falsity of the report on the part of the plaintiffs in error. Indeed in distinguishing the case from the Yates case the court did so on the ground that in that case 'there had been a recovery against the directors without proof of scienter, which proof the statute requires,' and added: '*Such proof has been supplied in the present case.*'"

And at page 83:

"There was an issue of knowledge tendered by the pleadings, and to sustain their side of the issue plaintiffs in error offered testimony of the correctness of the books, and to show that the report was a true copy of them, as it was alleged in their answer to be. No attempt was or is made to show why the notice from the comptroller was disregarded (we have seen it was known to plaintiffs in error prior to the attesting of the report), except that they point to the fact that \$97,000 of the items mentioned by the comptroller were subsequently collected and that they should have been given time to collect the other assets. But the fact of the false representation remains, and the assessment of 100 per cent upon the stock purchased by defendant in error, which increased the cost of his stock \$3,000."

Answering the contention in the Saratoga case that the report to the comptroller *was not voluntary*, but was due to the command of the bank act so that the element of volition of an action of deceit was wanting, the court said (p. 82):

"There is in effect an intentional violation of a statute when one deliberately refuses to examine that which it is his duty to examine. And such was the conduct of plaintiffs in error in this case. They had notice from the controller of the currency that \$194,000 of the items counted as assets of the bank were doubtful and should be collected or charged off. This "was a direct warning to them," as the trial court said, 'by the bank examiner and comptroller that assets to nearly twice the amount of the capital stock were considered doubtful.' They notwithstanding represented the assets to be good."

The sentence, that it is "In effect intentional * * * to refuse to examine," was in answer to the point that the report was not voluntary, and was the reflection of the fact that the directory actually knew the misrepresentation made in the report which they attested after they had received the letter of the comptroller which had named the items constituting the \$194,000 of the assets of the bank which were doubtful assets and proved to be absolutely worthless. The directors of the Saratoga bank, knowingly violated, and permitted the violation of the statute which required a true report of the condition of the bank when they permitted and attested the false

report which contained the *very items* which the comptroller and his examiner had reported to the directors as worthless and commanded to be collected immediately or to be charged out of the bank. It is in the light of these undisputed facts that the violation in effect intentional must be understood to mean a refusal of directors to examine that which it is their duty to examine. There is no purpose expressed nor do we think implied in the opinion in the Saratoga case to overrule the former judgment in these cases, nor the former judgment of this court that a knowing violation must be proved by bringing home to the defendant the knowledge of the falsity of the thing he reports, that is, that his violation must in effect be intentional, and known to be untrue.

It is certainly not a disclosure of an intent to deceive to show that mere negligence, innocent ignorance, or deception of the executive officers of the bank practiced upon the directors existed whereby they were unaware of any falsity in reports which they attested. Such innocent conditions do not constitute a knowing violation of the statute or a violation in effect intentional. When the language relied upon by the plaintiffs in error is viewed in the light of the facts existing in the Saratoga case, it furnishes no reason for criticising the judgments in favor of the defendants in the present cases, and much less furnishes any ground for claiming a departure from or enlargement of the rule of liability based upon knowledge established in the former opinion of this court in the present cases.

It is worth while to notice the language, that an intended violation exists where one deliberately refuses to examine. To refuse is to pour back or to throw aside one thing by the choice of another. It involves the use of knowledge and judgment. To deliberate is to ponder intelligently, to weigh as with a scale the choice between known things. Both words involve necessarily the exercise of judgment based upon knowledge all of which existed in the case of the directors of the Saratoga bank. They knew the *condition of their bank*

and the *existence of bad assets* and deliberately refused to exclude them from the bank and from the report made to the comptroller which directly resulted in the loss.

POINT 3—DIRECTORS DO NOT MANAGE, BUT ADMINISTER THE AFFAIRS OF THE BANK.

The Directors Under the Statute, Are Required to Administer the Affairs of the Bank so Far as the Duty Devolves Upon Them and Are Not Chargeable With Knowledge by Presumption of the Falsity of a Report Attested in Good Faith and Without Knowledge of Its Falsity.

The purpose in this claim is to argue the court into finding that the defendants had knowledge of the falsity of the reports which they attested, not as a matter of fact, but by presumption or implication arising from the performance of their duty under the statute. The essential weakness of this and the preceding point is that actual knowledge of false reports or intentional violation of the statute is conceded not to exist but that such knowledge, and violation are to be imputed, presumed or inferred from argumentation rather than from fact. Some standard of duty and obligation of the director is assumed, and from that, knowledge of the falsity of a particular report is to be presumed. The whole argument is false. The directors are not obliged under the statute, at their own risk to conduct and manage the affairs and extensive transactions and finances of the bank's business. They have the right to delegate the executive functions of the bank to specified officers and are not personally liable for the violation of the act by those officers in making and swearing to a false official report unless they participated in or assented to such violation. This claim will require a notice of the statute and particular reference to the evidence.

The bank act in the Revised Statutes, Sec. 5136, provides:

"The association shall become a body corporate and as such shall have power."

"5. To elect or appoint directors and by its board of directors to appoint a president, vice-president, cashier and other officers, and define their duties, etc.

"6. To prescribe by its board of directors, by-laws * * * regulating the manner in which its general business shall be conducted, etc.

"7. To exercise by its board of directors *or duly authorized officers or agents*, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, etc., by receiving deposits, etc."

(Sec. 5147) "Each director when appointed or elected, shall take an oath that he will, so far as the duty devolves on him diligently and honestly *administer* the affairs of such association and will not knowingly violate or willingly permit to be violated any of the provisions of this title, etc."

The presumption of knowledge on the part of the directors of the falsity of the reports which they innocently attested, is too unsubstantial and trivial to deserve extended consideration in view of the liability fixed by section 5239, which must be based upon knowingly violating or knowingly permitting the violation of some provision of the act or participating in or assenting to such violation. Substantial knowledge of the falsity of the report is the essence of the liability under the statute rather than a presumption of the knowledge arising from some argument as to the assumed duty of the director. It is beyond controversy under this statute that the directors may appoint executive officers and define certain duties which they must perform. Those duties of course do not reside with the directors, but upon the delegated officers. The bank is authorized to exercise, by its board of directors or duly authorized officers or agents, all its powers,—clearly showing an intention to separate the duties belonging directly to the board from those defined as applicable to duly authorized officers and agents. The directors are bound by oath *so far as the duty devolves on them* diligently and honestly *to administer* the affairs of the bank. The plaintiffs have made much of their demand that the directors shall actively and actually manage the affairs of the bank. No such obligation under the oath and no such duty under the statute is placed upon the director. In each specific instance of a report claimed to be false in these actions, the defendants are shown to have attested the

report only after it had been made by the bank as required by the statute, and had been sworn to by either the president or cashier. There is nothing in the statute which requires the director to enter the books, the actual assets and liabilities of the bank for an examination on his own part in order to make up the official report to the comptroller. There is nowhere any requirement that he shall take the responsibility of making and swearing to the report, but he has the right to rely upon the faithful performance of the duties of the officers appointed by the board to make the report true, honest and right in the first instance, and that the oath of one such officer attached to the report bears the verity of investigation and knowledge of the truthfulness of the report directly on the part of such officers in the performance of their duty. If he is not, in the course of his duty, advised of any falsity and is not aware of any fact or circumstance which discredits the truthfulness of the report, he has not knowingly attested a false report, nor permitted, nor assented to the making of such a report. This right to rely upon the appointed officers is sustained by the statute, for section 5211 provides:

"Every association shall make to the comptroller, not less than five reports during each year, according to the form which may be prescribed by him, verified by the oath or affirmation of the president or cashier of such association, and attested by the signature of at least three of the directors."

It is worthy of observation that the association must make the report, that is not a duty placed upon the director. It must be verified by the oath of the president or cashier, and then attested by the directors. It is true that there is no requirement that these duties shall be performed in the order named, but the evidence shows in these cases that this order was followed in every report attested by these defendants (B. of Ex., pp. 554, 573).

Mr. Yates said (B. of Ex., p. 573):

"Some employee of the bank would bring one of the statements down and I would see it was signed and attested by Mosher and Outcalt and in good faith, I signed it. I had my confidence in those people and the examiner of the bank."

This confidence had legal warrant in the statute, aside from the requirement that the report must be made by the bank and verified by the oath of the president or cashier, because section 5209 provides:

"Every president, director, cashier, etc. * * * who makes any false entry in any book, report, or statement of the association with intent in either case * * * to deceive any officer of the association or any agent appointed to examine the affairs of any such association, and every person who with like intent aids or abets any officer, etc., in any violation of this section, shall be deemed guilty of a misdemeanor and shall be imprisoned not less than five years nor more than ten."

Aside from the fact that Mosher and Outcalt were men of unimpeached standing in the community, in whom the directors had as they thought well-placed confidence and had a right to rely upon the truthfulness of the statements made representing the assets and liabilities of the bank, the statute likewise justified and permitted that confidence on the basis of the severe penalty which the violation of it, in deceiving a director into attesting a false report, would incur.

POINT 4—ATTESTING DOES NOT ASSERT ACTUAL KNOWLEDGE.

The Director by Attesting the Official Report Does Not Incur the Absolute Risk of its Being False, Nor the Liability Created by the Bank Act. The Evidence Conclusively Shows That the Directors Did Not Attest Recklessly Nor Regardless of Duty, But Believed the Reports True.

Much that has been said under point 3, is the basis for and is applicable to the argument under this point. As has been seen, the petitions were based only upon two reports which were attested only by Mr. Yates. The one of December 28, 1886, is so remote from the beginning of the deposits by the plaintiffs that it can have no possible effect as a basis for recovery. The one of December 9, 1892, is not so much complained of as other reports and no specific misrepresentation in that report is claimed as the basis of the recovery had in the trial court.

Aside from the fact that only one report is made possible ground of the action, the statute does not fix any such responsibility upon the attesting directors as is claimed here. Section 5211 of the Rev. Stat., requires the *bank* and not the directors to make the report in the first instance. There is no provision of the statute nor requirement by the comptroller that the directors should make the report, nor remake it on their own responsibility after it has been made up by the association. The statute also requires that the president or cashier must swear to the report and the comptroller required that the oath must state that the report is true. The whole and only duty fixed expressly by the statute or by the comptroller is that at least three directors shall attest by signature the report thus made and sworn to. The statute is construed to require that the report shall be true and the duty and liability of the director in attesting can be ascertained only from the obligation fixed upon directors by the statute. Primarily as we have seen, the statute requires the directors to administer the affairs of the bank, and the oath requires that the director will diligently and honestly administer the affairs of the bank, and not knowingly violate or willingly permit to be violated, any of the provisions of the act. The directors liability is based entirely upon the ground that he has knowingly violated or knowingly permitted the violation of the act, or has participated in or assented to such violation.

These related and interdependent provisions of the statute determine the character of the attestation and of the liability which may arise from a false attestation. The directors as we have shown, have the right to rely upon the executive officers performing their duty, honestly and truly as to making and swearing to the report. The directors' obligations begin with his attestation, when he must look into his own knowledge and conscious experience with the bank's assets and liabilities to determine that he fairly and truthfully believes the report to be correct, based on his own information and his reliance upon the faithful performance of the duties of the officers who have preceded him in making and verifying the report. The director is not required to act beyond the provisions of the oath, that he

must honestly act so far as the duty devolves on him. He does not attest at his own ultimate risk that the report is true. The claims of the plaintiff under this point are answered in the former opinion of this court at page 179, where it is said:

"Indeed, in one aspect, the ruling below went further than this when it was in substance decided that despite the exercise of diligence by the director if he attested an untrue report, he was civilly liable because he did so at his risk since it was his duty to know or to refrain from acting. That this imposed a higher standard of conduct than was required by the statute is obvious."

Enforcing the provisions of the statute just referred to it was said, that in order to make the director liable for the attestation he must knowingly violate his statutory duty, which could only be accomplished by a misrepresentation which was in effect intentional. We submit it cannot be intentional without knowledge that it was false and wrong as against the observation and experience of the director who attested.

In *Briggs v. Spaulding*, 141 U. S., at 147, it was said:

"They are not insurers of the fidelity of the agents whom they have appointed, who are not their agents, but the agents of the corporation * * * (p. 162). Certainly it cannot be laid down as a rule that there is an invariable presumption of rascality as to one's agents in business transactions and that the degree of watchfulness must be proportioned to that presumption."

MR. YATES HONESTLY BELIEVED THE REPORTS HE ATTESTED
TRUE.

Mr. Yates testified (B. of Ex., p. 550), that he took no part in the meetings by which the Capital National Bank was organized and he became a director.

"I was made a director while I was out on the road as I remember, and found it out on my return, sometime in 1884."

He had no knowledge of the alleged assets of the Marsh Bank, The Marsh Bros., Mosher & Company being taken into the Capital National or of the investigation of those assets by Directors Holmes and Stuart.

(B. of Ex., p. 551) Q. "Did you ever have any experience in examining or going through a set of books of a bank or any other such institution?"

A. "No, sir, I could not do it."

(B. of Ex., p. 552). He did not know President Mosher or Cashier Outcalt personally at the time he became a director, but their reputation for honesty and good character was first class.

(B. of Ex., p. 553) Q. "What was the plan or method by which you arrived at declaring dividends and upon what showing were the dividends declared?"

A. "Why, Mosher would pass a paper showing the earnings and expenses and would take out a certain amount for surplus, and the balance would be passed to dividends, and then a motion would be made what to do with it, a motion would be made declaring a dividend of a certain per cent. No dividend was ever declared without such showing of earnings and surplus."

Q. "Did you ever, at any of those meetings, have any intimation of any facts other than what was made to you by the officers of the bank as to the earnings?"

A. "No, sir."

Q. "State whether you had any belief in those reports of the condition of the bank and that net earnings were really in existence and something to pass to surplus at the time of those dividends."

A. "It was believed or else the directors would not have made it. I would not have made it, and I believed the report was true."

Q. (p. 554) "Had you anything or any intimation to discredit the statement of Mosher and Outcalt or their conduct of the business of the bank?"

A. "No, sir."

Q. "Did that confidence in their honesty and integrity exist throughout the existence of the bank?"

A. "Up to the time the bank failed? Yes, sir."

Q. "Now, during the existence of the bank, did you sign any of the reports which were made to the controller?"

A. "Those that were brought down and attested by Mosher and Outcalt I signed."

(B. of Ex., p. 573) A. "Why, when I was in the office, there, if Hal Young or some other employee of the bank

would bring one of the statements down I would see it was signed and attested by Mosher and Outcalt and in good faith I signed it. That is about all I know about it. I had my confidence in those people and in the examiner of the bank. I never made an investigation myself as to what the bank had in the way of assets."

(B. of Ex., p. 554) Q. "Were you ever present at a meeting that you remember, where any of those reports were discussed before they were made?"

A. "No, sir. Never. The reports I attested, were always sent to my office."

Q. "How were those reports signed or otherwise authenticated at the time they were brought to you for attestation?"

A. "Why, a notary would attach his seal to Mosher or Outcalt's signature and sometimes there would be two or three names ahead of mine. I never signed or attested a report which was not already sworn to by either Mosher or Outcalt."

Q. "What reliance, if any, did you put in the truthfulness of the statement, on account of its being sworn to by the managing officers of the bank?"

A. "Why, I had confidence in both those gentlemen, Mosher and Outcalt. Why, it made me sign it, I had confidence in them or else I would not have done it."

(B. of Ex., p. 555) Q. "Did you at any time during the existence of the bank have any intimation that any statements or items contained in any reports given to the comptroller and attested by you, were untrue in any respect?"

A. "No, sir."

(B. of Ex., p. 555) Q. "There is shown to have been handled in the bank, paper of Western Manufacturing Co., signed by E. Hurlbut. Did you know of that company?"

A. "Well, I knew of the so-called company at the penitentiary that Mr. Welsh was with, and a man by the name of Barton, but I never knew anything about it personally. It was an actual company doing business manufacturing barrels."

Q. "Did you ever have any knowledge or intimation of the existence or operation of a company known as the Western Manufacturing Company in which Hurlbut was manager?"

A. "No, sir. I knew nothing about it. I knew that one company but I didn't know who the president was. I

never knew anything about the company Mosher was president of, doing business on a capital of \$25,000 borrowed from the Capital National Bank."

Q. "Did you ever know or have any intimation of paper or notes or other obligation signed by that company, by Hurlbut as general manager, or otherwise, being taken into the bank and carried as assets?"

A. "No, sir, I knew nothing about it. I never knew Mr. Hurlbut, never saw him."

(B. of Ex., p. 558.) I had on deposit when the bank failed \$3,187.94. A few days before the bank failed, I put in \$3,063.90, which was lost in the failure.

(B. of Ex., p. 564.) Mr. Griffith of Wahoo was the bank examiner during several years up to the time of the failure. He relieved K. K. Hayden.

Q. "What opportunity did you have to see Griffith?"

A. "He was all over the state and I used to see him quite often on trains."

Q. "State what inquiry you ever made of him and what he reported to you concerning the bank?"

A. "Why, I would ask him how the Capital Bank was, and he would answer me that it was in good shape and a fine bank. I asked him several times, and by the way I was interested in a bank down there at Wilber and he examined that bank."

Q. "What, if any, information did Griffith ever give you of any bad condition or any criticism on the condition or conduct of the bank?"

A. "Why, that the bank was a good bank, he never criticized it at all."

Mr. Yates attended the meeting of the directors with Mr. Griffith Sunday, January 22, 1893, after the bank closed its doors on Saturday.

(B. of Ex., p. 565) A. "Why, Mr. Griffith, I think, opened the ceremony you may say. He says: 'This bank is \$160,000 short, and if you can make it up, you can open up on Monday, and if not, it will be closed.'"

Q. "What was said at that meeting about closing the bank or raising \$160,000.?"

A. "Why, I says: 'Mr. Outcalt, how is it?' I says, talking to Dick; I wanted to know what he meant by that, if we could raise \$160,000 the bank could continue to run.

—and he says: 'We can raise it.' But Mosher says: 'It's impossible.' That is that it would take more than \$160,000 to lift it out, and then when Griffith made this explanation, he started off with the remark that the bank was completely busted, why everybody there was just paralyzed—very much surprised."

Q. What did you propose to do about raising the money, or were you willing to help to raise it?"

A. "I was willing to help raise it. I was always willing to put in to save the good reputation and to save the bank, and to save the city."

Q. "What was Dr. Hamer's attitude on that question?"

A. "Why, they all agreed to it."

Q. "Now what was Mosher's remark about the bank going on if the \$160,000 could be raised?"

A. "He says: 'you can not do it.' By that remark we all understood it would take a great deal more than that, that the bank was looted and it was impossible."

Q. "Was there any move taken to turn the bank over to the examiner?"

A. "I suppose so. Yes, but I don't know as to that, but when we could not raise \$160,000, why then the receiver or examiner was in possession."

(B. of Ex., p. 571) Q. "And you had never had any intimation of any kind that the bank was in a bad way until that Sunday?"

A. "No, sir."

Q. "You thought the bank was getting along prosperously and making money?"

A. "Yes, sir, and in safe, judicious management."

(B. of Ex., p. 577.) Oh, the directors would talk over matters and things in the bank, and charge off a certain amount of papers and say how the loans was and if they made a loss, it would be charged off.

(B. of Ex., p. 578.) I suppose they were charged off, they said they would meet with a loss. I never saw the books, I supposed they had been—we talked the matter over the way they had done in different banks I had been connected with. Of course I did not go to work and see them charged off. Why, we talked the matter over there about the Small loan and

Mosher was inclined to regret that he did not submit to the loss. He sued the man, I think it was something like \$15,000, and he regretted that he had not submitted to the loss instead of putting any more money into it. Mr. Phillips knew all about the land and thought it would pay out.

(B. of Ex., p. 579) Q. "I believe you said in your examination this morning that you would have raised a row if you had known that Mosher and Outcalt were borrowing money?"

A. "What I understood by that was if I had understood that they were borrowing such large amounts of money as was reported here at the trial."

Q. "Did you know anything about the loans that were made to Ed. Mosher?"

A. "No, sir, I didn't know E. W. Mosher and didn't know the bank was loaning money through him in York and the western counties."

(B. of Ex., p. 580, referring to a meeting of the stockholders and directors held January 9 or 10, 1893.) Q. "But you knew there was no dividend to be declared for six months ending December 31, 1892?"

A. "I didn't know it until they had a meeting there—why I don't know——" (At this meeting he learned that the undivided profits account was wiped off to a certain extent and some six months paper had been cancelled, the same as banks are doing today, and that the bank failed to make a dividend at that meeting which was only ten days before it closed its doors.)

(B. of Ex., p. 583) Q. "They have asked you about the meeting where the paper of the bank was taken up piece by piece and looked over. Was that all the notes and valuable paper of the bank, or only some of it?"

A. "Only some of it, by the discount committee and the question was whether somebody was good or not, where their knowledge was not apparently sufficient."

Q. "Did you have any knowledge that the \$300,000 of the capital of the bank was spent, or wasted or lost at the time of the meeting in January?"

A. "No, sir."

(B. of Ex., p. 550.) Mr. Yates paid the full one hundred per cent assessment on 113 shares to the receiver after the failure.

DR. HAMER.

Dr. Hamer died before these actions were tried and his evidence was never taken in them. The testimony appearing in the bill of exceptions at page 590, was taken in an entirely different proceeding in the federal court before these cases were ever tried. That testimony was directed entirely to unlawful dividends, rather than the possible liability for his attesting the reports. This testimony shows (B. of Ex., p. 590), that he became a stockholder in 1884 and paid a premium for his stock as did Mr. Yates. Dr. Hamer became a member of the examining or discount committee by resolution of the board, February 20, 1892, to take the place of Mr. Holmes, deceased (B. of Ex., p. 344). He was a man advanced in years and frail in health and his testimony discloses his groping effort to perform his duty and to see that the bank was as trustworthy and its assets as good as his Quaker ideas of right would demand. He testified (B. of Ex., p. 590):

Q. "What was the process of declaring dividends?"

A. "Well, the amounts, the gross amount earned by the bank was looked up and given, and various expenses, clerk hire, rent, etc., were deducted from that, and then there was sometimes—well I think always—a remnant from the previous declaration of dividends added to that and then the remainder was—there was a dividend declared from the remainder."

(B. of Ex., p. 595) Q. "When these dividends were declared, they were made upon the faith of what Mosher stated to be the condition of the bank, were they not?"

A. "Oh, I couldn't say it was wholly on that. He made the statements, but then as I thought we had some knowledge of the condition of affairs."

Q. "Your knowledge of the condition of the bank was obtained from Mosher and Outcalt was it not, largely?"

A. "Partially, well no, I don't know as I could say it was largely."

Q. "Did you make any figures yourself as to the earnings, or did you simply take Mosher's statements?"

A. "Well, it was considerably Mosher's statement in regard to that as I have indicated. I hardly knew enough about the books to make a reckoning so as to verify this statement of his."

A. "Well, I have reckoned up expenses some and had reckoned up expenses as far as losses was concerned. I don't know that I got down to the foundation of that,—I made some reckoning."

Q. "Did you ever examine at any one time all the bills receivable and all the paper in the bank?"

A. "Well, I supposed so. We thought we were examining them all. We took up the bills receivable themselves."

Q. "Did you ever make any comparison of the books, to see whether all that was on the books was given you for examination?"

A. "No."

(B. of Ex., p. 590) A. "Why, yes, there were some bad debts, as far as I know they were stricken from the account."

A. "Well, after the decease of Mr. Holmes, I was on what was called the finance committee, and Professor Stuart and I looked over the—we examined the notes taken by the bank, the bills receivable, to see what condition they were in, what our judgment was in regard to their soundness, etc., and we had general supervision over that matter. That is, if we saw anything there that we were hardly satisfied with, we investigated it, and we usually found that there was some collateral somewhere, that frequently maybe these that we were suspecting were not just what we thought they should be, maybe they seemed perfectly safe."

(B. of Ex., p. 592) Q. "State what you did in reference to ascertaining the condition of the assets of the bank, whether you found out and investigated all that you could of the assets so as to know the real truth of the assets while you were a director?"

A. "Why, yes, as far as my limited knowledge of that kind of thing would admit, I thought I did. But I had the feeling that I did not comprehend the matter of keeping books, to look up closely. I never had any experience with that kind of bookkeeping, nor any other very much. My bookkeeping was a simple affair so far as the doctoring business was concerned."

Q. "Well, if you found any paper that you suspected or at least didn't feel satisfied about, what would you do then?"

A. "Well, it was Mosher that usually we went to for an explanation of the paper, and we would inquire in regard to the paper and as I speak of, if there wasn't

collateral there, and we didn't think it should be, why he made an explanation to me in regard to the paper and we found oftentimes some collateral that was not attached to the paper. At least he said there was collateral and I think he many times produced the collateral."

(B. of Ex., p. 593) Q. "Did you know this Western Manufacturing Company paper was in the bank?"

A. "I knew there was some, I think some signed by E. Hurlbut, Jr."

(B. of Ex., p. 594) A. "You see I didn't get commingled with that very much until after Mr. Holmes' death. I went in there frequently before his death and looked over the securities, but I didn't look it up very minutely at that time, and it was only—Mr. Holmes died in 1890 or 1891—well now if you are speaking of Hurlbut's notes before that, I wasn't so very observing of them previous to that time."

A. "Well I didn't have a very distinct recollection of this Manufacturing Company's paper. I didn't have any reckoning on that."

Q. "Do you really know whether you ever saw any of it?"

A. "Well, I don't know that I ever said positively that I did. It seems to me that I saw that paper."

Q. "Did you ever see any of them after that?"

A. "Well it seems to me so. It seems to me I saw some there. I have some recollection of it. It may have been previously to Mr. Holmes' death. As I say, I went in there and looked over the notes, etc."

(B. of Ex., p. 597.) In answer to a long question of many assumed losses, he was asked: "Did you think the bank was justified in declaring and paying dividends?"

A. "I don't know as I am banker enough to decide just what amount a bank might lose and still declare a dividend. I don't know——"

(B. of Ex., p. 598) Q. "Suppose the bank had lost \$25,000 during the year and the net earnings were \$25,000 would you think the bank ought to pay a dividend?"

A. "No, I don't."

Q. "Did you know there were certificates of deposit outstanding in excess of the amounts that appeared upon the books?"

A. "No, I didn't know it."

Q. "If you had known that fact would you still be in favor of declaring a dividend?"

A. "I would not be in favor of declaring a dividend if there was nothing to declare them from—no profits."

Q. "Did you know there were erasures and fictitious entries and falsifications in the certificate of deposit register?"

A. "I have heard it so said."

Q. "Did you know it prior to the failure of the bank?"

A. "No, and I had not inspected these books, or the certificates themselves, or the stubs on which erasures and discrepancies appeared prior to the failure of the bank."

A. "Why, no, I wouldn't think it was proper to declare a dividend if \$30,000 of the earnings had been stolen by the officers who concealed the fact, and I would not have thought it proper to declare a dividend if I had known that there were hundreds of thousands of dollars in outstanding certificates of deposit that were not entered on the books. I signed the reports of September 30, 1892 and September 25, 1891, and read them before signing, but did not verify them with the books entire. I suppose I knew that those figures on the report showing the amounts of overdue paper, bad debts and loans in excess of the limit were on the report, and I suppose I knew it when I signed it, but my understanding of that is that it started with a small affair (partly the Small loan), and then ran up to these amounts."

MR. R. E. MOORE.

Mr. R. E. Moore testified (B. of Ex., p. 602), that about September 3, 1891, he sold his fifteen shares of stock in the Capital National Bank to Mr. Hamer.

"Now explain the circumstances and your conversation with Mr. Hamer and the sale of those shares to him."

A. "Well, Dr. Hamer came into our office one morning and it was about the time that some of the stock had sold for \$1.45, and I told him some of the stock of that bank had sold for \$1.45 and the doctor said it was worth it, and I asked him if he wanted to buy mine at that price. 'No,' he said he would not give that price, but he would give \$1.25, and I told him he could have mine, so I sold him the stock and he paid me right then and there for it, the full amount of \$1,875."

(B. of Ex., p. 604) Q. "Why did you sell your stock?"

A. "Well I sold it because I thought it was a fair price for it and I could use the money."

Q. "Notwithstanding Dr. Hamer told you at the time that other stock sold for \$1.45?"

A. "Yes, sir, notwithstanding that. I wasn't a very great enthusiast for bank stock, never was, and sold it for no other reason that I know of."

This purchase only added to the liability of Doctor Hamer on his stock holding to the receiver when he had to pay the one hundred per cent assessment shown by the receiver's receipts (B. of Ex., p. 567).

We confidently assert that no one can fairly read the testimony of Mr. Yates and the fragment of that of Dr. Hamer, and say that either of them dishonestly or with any reasonable ground of apprehension attested the reports with any sort of knowledge that they were false and not true. Undoubtedly they were deceived and placed confidence in their executive officer where it was not deserved. It is easy to exercise wisdom after the event when dishonesty, fraud and corruption were disclosed by the failure of the bank. It required no special acumen or wisdom to discover the prevalence of the fraud in the books and transactions of the bank, but these directors as well as the community at large, when the bank was in apparent successful operation, were looking at the matter from an entirely different angle. They believed and had every reason to believe that the executive officers were capable, honest, worthy men, that the assets presented to them or represented as being in the bank, were actually there and that the earnings as reported at dividend periods, and the assets and liabilities represented in the reports faithfully and honestly reflected the actual condition of the bank. It was not until the meeting of January 9, 1893, ten days before the failure of the bank, that any discredit or word suggesting possible bad condition of the bank was brought to the attention of the directors, when the dividend for the six months ending December 31, 1892, was not made and Captain Phillips made some assertion of the impairment of the capital.

It is vitally important to remember that this disclosure of any discrediting circumstance, was long after Mr. Yates and Dr. Hamer attested their last reports. Mr. Yates attested last

the report of December 9, 1892, nearly a month before this meeting, and Dr. Hamer attested last September 30, 1892. There is absolutely no evidence in the record which would impute any knowledge of the falsity of either of those reports to either of these directors at the time they attested. Their positive and unqualified testimony shows that they honestly attested them with the full belief that they were correct and had been made true by the executive officers.

Mr. Yates had that confidence in the officers and in the soundness of the bank that on the 16th of January, the week of the failure, he placed in his deposit account over \$3,000, every cent of which was lost in the immediate failure. Dr. Hamer, within eighteen months of the failure bought fifteen shares of the stock at \$1.25, entirely on his own volition, which he held to the end, and by that means added to the assessment which he had to pay the comptroller.

Mr. Yates was made a director when he was away from home and without his knowledge. He knew nothing about the assets which were pretended to have been transferred from the Marsh companies into the Capital Bank. He never knew the account with Donald-Lawson-Simpson existed. He, like Dr. Hamer, knew there was a real Western Manufacturing Company, but did not know that a spurious company represented by Ed Hurlbut was borrowing money from the bank, or that its notes were a large part of the pretended assets, of the bank. He knew the examiner, Mr. Griffith, and repeatedly learned from him that the bank was prosperous and successful and in trustworthy hands. On no occasion did the examiner ever suggest to him that there was anything to criticize in the bank's business. His simple statement of what occurred at the meeting of the directors with the examiner on the Sunday which completed the failure, exhibits such astonishment and resentment at the necessity of raising \$160,000 in order to permit the bank to run, that no one can believe that he knew the bank was ruined, and its assets worthless, or the reports that he had been attesting were false. When Mosher said, "It is impossible," and made it plain that the bank was ruined

and could not be lifted out, the paralyzing surprise and condemnation by those directors of their trusted officer and agent are not the evidences of deception on their own part. They were not men who could play any such part, but were responding to their actual state of mind.

They both said that paper of the bank was examined by the discount committee, and doubtful paper was discussed by the whole board when certain losses would be disclosed. They honestly supposed that these losses were charged off the books and had every reason to believe that it was done, but the fact disclosed that their dishonest officers reported the charging off which never took place. It was not a matter simply of pride that they stood by their ship until it went down. It was the manifest confidence in their officers and that they thought they knew the bank was in safe hands and in good condition that they remained to the last, and lost their deposits, the 100 per cent assessment on their stock, and all but their good name. It is almost pitiable to observe the aged doctor at the close of the bank's history, placed upon its discount committee, attempting in his unschooled way to examine and estimate the assets of the bank. He may have been incompetent, it may be that some younger, better prepared man should have been a director in his place, but we submit that his repeated statements of his honest efforts at investigation, at seeking through the books for the truth, and his confidence in President Mosher, who brought him all sorts of statements and collateral securities to convince him that the bank actually had all the valuable assets which its books or reports disclosed, are evidence of such an effort on his part and such deception played upon him, that we think no one can say that he dishonestly or knowingly attested the false report of September 30, 1892, or the others before it.

The questions submitted to him concerning dividends show plainly that he would not and did not vote for a dividend when he was aware that the bank did not have the funds honestly earned with which to make them. Even the Ne-

braska supreme court in its former opinion in these very cases, in 74 Neb. 746, concerning these same directors, said:

"We do not wish to be understood to say, that all of the defendants knew that such statements were false. We are satisfied that such is not the case."

Mosher and Outcalt were defendants in these actions at the time this was said and the line of demarcation in the above sentence was between them and the present defendants.

We challenge the attention of the court to the extensive use of the opinion of Van Kirk in 106 N. Y. Supp. 538, quoted at length at page 46 of the plaintiffs' brief in the case of *Thomas v. Taylor*. This is the opinion of the trial court, which was entirely reversed and set aside by the opinion of the appellate division in 108 N. Y. Supp. 454, which was adopted by the court of appeals of New York, and is the basis of the opinion of this court in the same case. It is not a little surprising that counsel still pursue the wanderings of the New York trial court so far from the law applicable to these cases. Justice McKenna, in the opinion in *Thomas* case, said (p. 79):

"The judgment was affirmed by the court of appeals, 'on opinion of Cochrane, J., in the appellate division.' We shall refer to the opinion as that of the appellate division although it was adopted by the court of appeals."

POINTS 6-7—THE SUPREME COURT UNDERSTOOD THE LAW APPLICABLE.

The State Supreme Court Has Correctly Understood and Applied the Bank Act Creating and Defining the Liability of Directors as it Was Construed by This Court and Has Not Come to a Wrong Conclusion in Applying it to the Evidence.

These two points are so related that they must be considered together. It is of vital importance that the state supreme court should correctly understand and faithfully apply the rule of liability fixed by the statute as construed by this court to the evidence in arriving at its conclusion. We submit that this has been properly done. The heading under point 6, does not correctly represent the rule as to the requirement of knowledge of the falsity of the reports as applied by the state

supreme court. Only two short sentences are quoted while the whole opinion and the manner of applying it to the evidence must be considered in order to determine what understanding the state court really had of the law as construed by this court in the former decision. The opinion (Trans., p. 49), and the syllabus which is the court's own product when fairly considered from end to end will leave no doubt that the Nebraska supreme court had but one purpose and an eye single to the accurate application of the statute as construed by this court to the facts which it found from the record.

The first point of the syllabus holds that section 5239 affords the exclusive rule to measure the right to recover damages from directors for a loss resulting from their violation of duty imposed by the act, and no higher or different standard can be imposed.

Point 2, that a statute creating liability against directors for a knowing violation of its provisions requires proof of something more than negligence and it must be shown that the violation was intentional.

Point 3, that the state courts have no authority to construe, nor apply any other rule of liability than that provided by the bank act and that the state court must follow the rule adopted by the supreme court of the United States.

Point 5, that the statutory rule of liability is exclusive, because where a statute creates a duty and prescribes a penalty for non-performance, the rule prescribed by the statute is the exclusive test of liability.

Point 6, that if it is attempted to hold a director liable as for fraud and deceit at common law for the conduct of the other officers of the bank, still it must be proved within the statute that the director had knowledge, or approved of, or participated in the fraudulent acts complained of.

In the opinion (Trans., p. 50), it is said :

"And the petitions still charge the defendants with making false statements to the comptroller of the currency as to the condition of the Capital Bank, and this is the

main foundation or basis for recovery (Trans., p. 52). As we view the opinion of the supreme court of the United States, * * * there was required in this case, of the directors of the bank, only that standard of conduct expressly imposed by Sec. 5239, Rev. Stat., and no higher duty may be rightfully established and demanded. A bank director is guaranteed immunity from liability under the very law that permits him to become a director. * * * A knowledge must be brought home to the director that he is deceiving. * * * The director is not liable for his own mistakes or blunders, or for the mistakes of his brother directors; neither is he liable for the frauds and wrongs of the officers of the bank unless he has personal knowledge thereof, or participates in such fraudulent acts. * * * The rule for which plaintiffs contend (knowledge by imputation or presumption) if carried to its ultimate conclusion would make the director, *who has himself been imposed upon and deceived by its officers* and who has thereby suffered loss, liable to the depositors for the fraudulent acts of such officers. * * * (p. 55) Plaintiffs having failed to allege and prove that the defendants personally knew of or personally participated in the acts of the officers of the bank of which they now complain it seems clear that if we follow the decision of the supreme court of the United States in these cases, they are not entitled to recover and the judgments of the district court should be reversed as to all of the defendants."

Judge Letton said:

"The presumption is that they (the findings of the trial court) are so sustained, but I have not examined the evidence so critically as would be necessary to determine *this* for the reason that under the holdings of the supreme court of the United States *as to the measure of duty and of liability* of directors under the banking laws of the United States, *I think a case has not been made*. For that reason alone I concur in the conclusion."

The state supreme court was reversed on a former writ because it had held that knowledge was not necessary to liability. The act and the decision of this court, require proof of knowledge of the falsity of the attested report in order to make the director liable and that knowledge of the falsity must be such as comes about by a violation of the statute in effect intentional on the part of the attesting director. The very character and essential of that knowledge is that it shall

be personal. Knowledge on the part of someone else will not satisfy the requirement of knowingly violating the statute. The same is true of participating in or assenting to, which is particularly personal. One neither assents to nor participates in a false representation without his personal or individual conduct or action. So the Nebraska court was not wrong in saying that there was no proof that the defendants personally knew of or personally participated in the acts of the executive officers of the bank, when they with the most secret connivance and fraud, made false reports which they published. The cases in this court besides the present ones, were studied and relied upon by the Nebraska court and while the case of *Thomas v. Taylor* is not specifically referred to in the main opinion, it was well known by the court, was argued, and brought to its attention long before the decision was rendered. It is really in the mind of the court and specifically enough referred to in the sentence (Trans., p. 52): "Such has not been the views expressed by the supreme court of the United States in *any cases*."

No one can possibly claim that the Nebraska court did not strenuously and expressly try to follow and apply the decision of this court in these and all the other cases based upon section 5239 and the other provisions of the bank act.

On page 66 of the plaintiffs' brief it is said that Judge Letton decided against liability under the rule laid down in the opinion of Judge Hamer. This is not correct, although he might well have done so, because his language quoted above does not refer to Judge Hamer's opinion but simply and alone to the opinion of this court as the basis for his conclusion. On page 65 of the brief it is said that he afterward saw his error and voted to grant plaintiffs rehearing. This is likewise untrue. Judge Letton has never expressed on the record or otherwise, any such change of opinion, even if it could be of any effect. The only possible ground for such a statement is the gratuitous remark of Judge Sedgwick (Trans., p. 93), in his opinion against the ruling denying the rehearing. There he said:

"One of the four judges who had made that order, found matters in the record which convinced him that the order was wrong and voted for a re-hearing."

There is absolutely nothing in the record to sustain any such statement. It is not shown to have the approval of Judge Letton and ought in no way to discredit his deliberate concurring opinion.

At page 66 of plaintiffs' brief it is said, that the state supreme court did not disturb the findings of the trial court but holds that on the findings liability did not arise because they did not positively establish actual personal knowledge or participation. Heretofore we have shown that the state supreme court acted as a trial court when it rendered the final judgment. The judgment and findings of the lower court were reversed and the action dismissed on the findings made by the supreme court. The findings of the trial court cannot by any possibility be of any consequence now. They are reversed, set aside and were found to be erroneous upon many sufficient reasons which were presented to the state court, among which was the absolute failure of the evidence to sustain those findings and that they were based upon incompetent and unlawful evidence which the supreme court of the state had every right to ignore in arriving at their judgment after sustaining our objections to the evidence. It is impossible to give those findings and judgment of the primary trial court any validity or effect. Even a reversal by this court could not restore them. It is no proof that the state supreme court applied a wrong rule of law to the evidence to say that the findings of the trial court might have been admitted and still no liability follow because the state supreme court did not admit the findings. They were reversed because they were not sustained by the evidence and the evidence did not support a finding of knowledge of the falsity of any of the reports by either of the defendants. Again it is said (brief, p. 66), that "whatever view may be taken, the evidence is sufficient to sustain the findings and judgments in this court. Indeed no other result was possible under the evidence," and at page 111, "that the trial court

applied the right rule and its findings are sustained by the evidence so that no other conclusion was possible than the judgments which it rendered."

We do not regard these meager suggestions as an appeal to this court to review all the evidence and to reverse the judgments of the supreme court of the state on the theory that the evidence would not sustain any judgment except liability against the defendants, because it was claimed there was no evidence to sustain a judgment in favor of the defendants. The fact is that the defendants claim and the evidence shows that there is no foundation in it for liability against the defendants. The plaintiffs' brief from beginning to end, is a plea, not for actual knowledge of any defendant of the falsity of any report, but that knowledge should be imputed, presumed or inferred by some process of indirection so that this claim that the evidence sustains no other conclusion or possible result than liability, is baseless upon the face of the proof and record. But if this claim is a demand for an investigation of the whole record for this court to pass judgment of liability on its own investigation and determination of the evidence, then it must fail because as we have argued at points A and B in this brief, that this court is bound by the findings of fact of the state supreme court and that the printed bill of exceptions does not contain all of the evidence which prevents a review of it.

At page 67 of the plaintiffs' brief it is said that it is impossible to imagine the defendants' ignorance of the bank's perilous condition without being guilty of wanton recklessness, wilful disregard of duty or deliberate determination to be ignorant. This action in the petition is based upon the claim that the defendants attested false reports of the bank with knowledge that they were untrue within the provision of the bank act, and that the liability fixed by the act must follow such violation. The petition is not based upon any claim of recklessness, disregard of duty or voluntary ignorance of the directors. These petitions were drawn to avoid just that claim of malfeasance, mismanagement and reckless disregard

of duty, because the prior petitions had been held on that basis to state a cause of action which belonged to the receiver, any recovery in which must be ratably distributed among all the creditors of the bank (*Bailey v. Mosher*, 63 Fed. 488, at 491). It may not be necessary to refute these charges of reckless disregard of duty made against these defendants, but we submit that the review of the evidence which we have heretofore made will convince no one but a partisan, that these defendants purposely, wilfully or wantonly failed to do what they thought was their duty or failed to know the doings of their bank so far as it was possible for them to ascertain them in view of the fact that they had confidence in their two executive officers, who were really the most contemptible criminals in their persistent deception worked upon the directors as well as upon the citizens at large.

Beginning at page 67 of plaintiffs' brief is an array of many matters in which the executive officers of the bank committed frauds and crimes, which after too long delay, resulted in the catastrophe in which these defendants lost their property as did the plaintiffs by being deceived. We do not regard it profitable to answer these different items further than to call attention that in not one of them is it claimed that these two defendants had actual knowledge of the falsity or fraud in any one of the items. The constantly reiterated claim is that the directors ought to have known these things existed. Many of them were difficult for experts to find after failure had brought discredit upon everything the bank and its executive officers ever touched. Most of them would have required extensive search by experts in order to be found out from the books and business of the bank. None of these directors were called upon to make such examination and no suspicion of dishonesty or deception disturbed their confidence in their officers to demand any such investigation. At page 71, plaintiff's brief, it is said that the forged notes and false accounts of Donald-Lawson-Simpson was called to the attention of the directors and discussed at a meeting held early in September, 1891. This so-called meeting never existed. It is the

figment of the diseased mind of the witness Scott reflecting the suggestion of others. But reference to the bill of exceptions, page 360, shows that Scott denies that Mr. Yates was at the supposed meeting and does not mention or pretend that Dr. Hamer was among those named as present. There is absolutely no evidence to sustain the claim that either Dr. Hamer or Mr. Yates discussed or knew about the letter of September 8, 1891, either at that meeting or any other place.

On pages 74, 75, plaintiffs' brief, it is said:

"The slightest inspection would have disclosed the fraud in the certificates of deposit account and any bank officer could have discovered this fact by mere inspection at any time." (Referring to the discrepancy of \$100,000 in the individual deposit books.)

"The mere presence of one of these notes among the assets of the bank, was sufficient to put the directors upon inquiry." (Referring to Western Manufacturing Co. notes.)

These quotations are characteristic of the whole list of these different items of fraud. It is not claimed that either Mr. Yates or Dr. Hamer was aware of any of these frauds nor that the reports which they attested were untrue by virtue of them. Imputation, presumption and indirection are the substance of this whole argument and fall far short of casting any discredit upon the findings of the state supreme court that these directors were honestly unaware of the falsification of the reports in these or any other respects, made by the executive officers of the bank.

POINT 5—THE COMPTROLLER'S LETTERS.

These Directors Never Saw Nor Knew the Existence Nor Contents of the Comptroller's Letter of September 8, 1891. They Were Not Advised of the Bad Condition of the Bank Nor of Any Falsity in the Reports in the Letter of February 16, 1892, or Otherwise, and the Letters Furnish no Basis For Liability.

LETTER SEPTEMBER 8, 1891.

There is absolutely no evidence in the record which directly or by inference shows that the defendants, Yates and Hamer,

ever knew of the existence or contents of the comptroller's letter of September 8, 1891. Plaintiffs' counsel have persistently charged knowledge of this letter to the directors, but we have repeatedly and vociferously challenged him to cite any evidence that these directors were aware of the existence or contents of this letter, and the challenge remains absolutely unanswered. The letter (B. of Ex., p. 73), was addressed to Mosher and there is no request in it that it be called to the attention of the directors or that they be required to know or do anything about it. It is a criticism of Mosher's conduct of the bank, and there is every reason, even if he had been honest, why he should not volunteer in bringing it to the attention of the directors. Since the letter called attention to his misdoings it is conclusive that he would not submit it to the attention of his directors. If these directors had been conspirators with Mosher in his misrepresentations of the financial condition of the bank in its books and reports he would not need to secrete this letter of September 8, 1891, from them, for the plan would have been concurred in and understood before and the comptroller could not have deterred any of them. But with the honorable men he had as directors he knew that to disclose the letter to them meant certain revelation of the bank's insolvency and immediate ruin. The fact that he suppressed the letter goes to prove the honesty of these directors. But laying aside argument one way or another, the record absolutely fails to disclose any ground whatever upon which to claim that these directors ever knew the letter of September 8, 1891, existed.

Plaintiffs print the letter in their brief (p. 83), and at page 88 claim eleven points of falsity, and dishonesty in the books, condition, and reports of the bank were directly called to the attention of the directors by this latter so that the case against them is equal to or stronger than the situation produced by the letter of the comptroller pointing out the bad debts of the Saratoga bank which its directors were fully aware of. Since the directors in our case never knew this letter existed, nor the nature of its contents, the parallel claimed in the Thomas

case falls of its own weight. Although the fact is that the directors were not aware of this letter, the dissenting judges in their opinion (Trans., p. 65), make the warning of this letter the basis of their disagreement with the other judges. It thus appears that at least two of the judges of the Nebraska court were deceived by these groundless claims that the directors knew of the letter of September 8. We hope to have made this point sufficiently definite that no one will ever again give credit to this baseless claim.

Mr. Yates testified (B. of Ex., p. 563) :

Q. "Did you ever see or know anything about the letter of the comptroller of the currency to the bank or to Mosher of date, September 8, 1891?"

A. "No, sir, not that I remember of."

(B. of Ex., p. 571) Q. "You never remember of the directors discussing any letter from the comptroller you say?"

A. "No, sir, I never was present if they did."

Q. "Never heard about any letters from the comptroller criticising the condition of the bank in any way?"

A. "Not that I remember of."

Q. "Well, you think you would remember a thing of that kind don't you?"

A. "Oh, yes."

Q. "If there had been anything of that kind you had such a good opinion of the bank—if there had been any criticism by the comptroller it would have impressed itself upon your mind?"

A. "I should think so."

Q. "But you think nothing of that kind ever happened?"

A. "That is my impression, yes, sir."

The witness Scott (B. of Ex., p. 360), claimed to have overheard a meeting in September, 1891, where he thinks the directors were discussing the condition of the bank and possibly a letter, but disclaims any positive knowledge of the subject of discussion. He names those present and does not mention Mr. Yates or Dr. Hamer and disclaims that Mr. Yates was there. If therefore by any possibility, the letter of Septem-

ber 8, was discussed, neither of these defendants were pretended to have been present.

LETTER OF FEBRUARY 16, 1892.

The comptroller's letter of February 16, 1892 (B. of Ex., p. 77), was addressed to Mosher and its last paragraph requested him to bring it to the attention of the directors for consideration and reply over their signatures. Mosher did call this letter to the attention of the directors at a meeting reported in bill of exceptions, page 344, as being held February 20, 1892. The directors' meetings, regular and informal, were usually held at night in the office of the bank, but this meeting for reasons not known to any of the directors, was held away from the bank's office. Dr. Hamer testified (B. of Ex., p. 596) :

Q. "When was it that you had this meeting for the purpose of considering the condition of the bank and answering the comptroller's letter?"

A. "Why it might have been—let's see—that is the 24th of February, 1892. Well it must have been thereabouts."

Q. "And where was that held?"

A. "Well, I believe it was the Burr Block, I don't distinctly mind whether it was the Burr Block or Richards Block, but where I was in the building would indicate to me that it must have been the Burr Block."

Q. "Why was it held away from the bank?"

A. "I don't know why."

Q. "Isn't it a fact Mr. Hamer, that you thought the bank was in rather a critical condition at that time?"

A. "No, there was not that feeling, that wasn't the reason. I don't know why. I don't remember any reason why it was there."

Q. "How long were you in session that day?"

A. "Oh, not very long."

While the report of the meeting is made by Mosher to show that Mr. Yates was present, his testimony just quoted above shows that he was not present when any letter of the comptroller was ever discussed. Mr. Yates said (B. of Ex., p. 583) :

Q. "And you say you don't know anything about the directors' letters that were written to the comptroller in answer to some inquiries?"

A. "Not that I remember of, no, sir."

A. "I will say this that I wasn't present at a meeting of the directors there when they canvassed the thing over. It may be like those reports that they would bring the letter down to me and I signed it, but I wasn't present when they had the meeting."

Q. "But you wouldn't say that you didn't sign those letters to the comptroller?"

A. "Well, I didn't sign it there. If they had a meeting and they brought that letter to me and said they had a meeting and wanted me to sign it, I suppose I would have signed it, but I don't have any recollection of signing that letter or of ever seeing it."

Q. "Of course, it has been so long ago that you might have forgotten about it, Mr. Yates?"

A. "Well, that might be, of course it is eighteen years ago."

Q. "It is possible that you might have been present and heard those things and have forgotten it by this time."

A. "Well, a thing of that kind, if it had come from the comptroller why I would have been alarmed and taken the matter up with my friend, Captain Phillips and we would probably have done something."

While it was not understood by the directors at the time why the meeting to consider the letter of February 16 was held across the street or a block away from the bank, nor why the letter was prepared by Mosher himself and presented to the directors for signature away from the bank, nor why Mosher included Mr. Yates' name in those present when he was not in fact present, yet it is plain that this proceeding was another phase of Mosher's deception practiced on the directors. Naturally the meeting was called at another place in order to prevent the directors calling upon him to show from the books that the letter was correct or in order to induce them to accept the letter prepared by him rather than any other source of information concerning the facts. He would enter the presence of all the directors in the minute book in order to make a proper showing to the examiner, even if Mr. Yates was not

present. Mr. Yates signed the letter away from the bank and at his own office, as he had signed many of the reports, because it bore the signature of Mosher and some of the directors. Mosher had a prior experience with the letter of September 8, 1891, and he did not propose that this letter which must be called to the attention of the directors for answer should result in any suspicion by them which might disclose the rankness of his dishonesty in his conduct of the bank. He preferred to rely on his own wits to prepare a plausible letter and upon the fact that the directors were confident of his honesty, and had no reason to discredit either his ability or fidelity, to obtain their signature to such report as he thought suitable to the comptroller.

LETTER OF FEBRUARY 16, 1892.

The letter of February 16, 1892, first calls attention to loans which exceed the legal limit of ten per cent of the capital, to E. W. Mosher and G. W. Small. The answer of the directors under date February 19, 1892 (B. of Ex., p. 63), correctly states that this was the money advanced to Ed Mosher on the security of C. W. Mosher, which was loaned upon land in York and Hamilton counties, directly for the benefit of the bank, which is explained in the first three paragraphs of the answering letter. The only fault found by the comptroller was that this loan was larger than the ten per cent limit. It may have been perfectly good, and so far as the directors knew, was a safe investment, but technically it was larger than the amount permitted by law. That is the only fault found with it. The same is true of the Small loan which was made on a note of the Fairfield bank for \$20,000 secured by mortgage upon real estate. In order to protect and finally to save that security through litigation this loan ran up to \$51,000. The testimony of Mr. Yates (B. of Ex., p. 578), discloses that the director Mr. Phillips was acquainted with the land and thought it ample security for the investment although Mosher had at times regretted that he had not stood the loss of the original loan rather than to continue protecting it with further investments. This loan was not criticized except on the technical

basis of its exceeding the legal limit of ten per cent. The fourth and fifth paragraphs of the answering letter explain that situation so far as the directors knew it to be.

The loans carried for a number of years are suggested to be collected as soon as practicable, but no time is fixed for collecting, and none of them are condemned as bad or even doubtful. It is a bare suggestion that Mosher's liability as an endorser is too large, and the directors are not called upon to take any specific steps with regard to it. The letter recognizes an agreement or promise of Mosher and Outcalt to reduce their liabilities and to adjust all accounts so that overdrafts will be confined to temporary matters and that they will pay less attention to business matters outside of the bank and give their attention to its business. The comptroller simply states this promise of Mosher and Outcalt, but does not require anything of the directors with regard to it. There is no claim that the soundness of the bank, or the value of its assets nor the extent of its liabilities are misrepresented or dishonestly reported on account of these doings of Mosher and Outcalt. Overdrafts are mentioned, but in no instance are they condemned further than to say that they should be avoided as far as practicable. There is no intimation that the overdrafts are not good and collectible, nor that the directors should suspect any of them.

Overdue paper partly classed as bad debts, is directed to be renewed, with security, but none of it is condemned as worthless, nor ordered to be charged off the books of the bank nor to be collected immediately, but only after reasonable extension. All the losses that the examiner and comptroller were able to call attention to were the losses aggregating \$30,000 including the bad debts mentioned, which were charged off during the examination of the bank. Here is no demand upon the directors to see that bad debts were charged off, nor to investigate any other bad debts as worthless. They are given the official assurance of the examiner and of the comptroller, that all the bad debts which should be charged off, were disposed of during the examination apparently in the presence of the

examiner with the approval of the comptroller. Surely the directors had a right to rely upon these official assurances and to believe that all the worthless or condemned paper had been charged out of the bank and that its condition was unimpeachable and its assets unimpaired.

The examiner calls attention to the meetings of the directors. While it is true that the records show only two meetings a year, it was well known to the directors that informal meetings were held much more often, and that the bank had a discount or examining committee throughout its existence consisting of Professor Stuart and Mr. Holmes, except for the short period between the death of Mr. Holmes and the appointment of Dr. Hamer at the meeting which considered this letter. The only suggestion or criticism against the directors is that they should hold more frequent meetings.

Borrowing money by re-discounting the paper of the bank, is mentioned as having been largely reduced since the previous examination and it is suggested that all this liability be paid off and the power to re-discount reserved for emergencies. Re-discounting is not illegal and it is not condemned as having endangered the solvency or good standing of this bank. The liability from re-discounting is only the contingent one of the endorser of the paper discounted and it is not intimated by this letter that the soundness of the bank or the integrity of its assets should be questioned by the directors on account of the re-discounting. It rather explains that re-discounting is made necessary by excessive loans, and it is recommended simply that the over due paper should be collected or renewed.

This letter coming with the authority of the comptroller on the information of the examiner, does not condemn any assets of the bank nor order any examination further to be made by the directors, nor advise them to suspect the dishonesty or conduct of any officers of the bank nor the soundness of its standing or condition. Mosher's letter explains these various items and especially the overdrafts and the re-discounting in detail as to amounts which the directors had every reason to suppose were honestly taken from the books of the bank

actually showing the facts stated in the letter. They were deceived into signing the letter by the same shrewd methods which Mosher had employed in the attestation of the reports, but it is manifest that they honestly believed the answering letter to be true and that their bank was sound and solvent, and that the reports they attested were true. The directors were not called upon to make any independent investigation of the condition of the bank, the honesty of its officers, nor of any particular asset or liability. They were not requested either personally or by the service of an expert to make an independent investigation or examination of their bank or any of its assets or liabilities. They were assured that the actual bad debts were already charged off, that the over due paper was largely reduced and that the re-discounts have been largely reduced since the last examination. Instead of the letter demanding suspicion or giving warning of actual bad assets or of a critical condition of the bank, it assured the directors that the right things were being done to correct the matters subject in any way to criticism, and that the bank was solvent and sound so far as these directors were required either to know or to find out by investigation, and that its executive officers were not subject to distrust or discredit either with the examiner or the comptroller.

At this point a slight comparison of these two letters will disclose that upon every point on which it is claimed the directors were warned of the falsity of the accounts and of the reports and of the bad condition of the bank appears only in the letter of September 8, 1891, which they never knew existed and not in that of February 16, 1892. It was in the letter of September 8, 1891, that the comptroller pointed out that the overdrafts were misrepresented in the last report where they were entered at slightly over \$12,000 when the books showed them to be over \$55,000 and were misclassified as loans and discounts, and demanded that the reports and published statements should show the full amounts actually appearing on the books. The directors never saw this warning and such misrepresentation in the official report was nowhere mentioned

in the letter of February 16, 1892, nor anywhere else, that came to the attention of the directors.

The letter of September 8, demanded that bad debts of which \$14,000 appeared in a report, should be charged off prior to declaring a dividend. The directors never saw this, and the letter of February 16, makes no such demand, but advises the directors that \$30,000 of bad debts were charged off in the presence of the examiner which was in no way intimated to affect the possibility or presence of funds with which to make a dividend at the following dividend period.

The letter of September 8, showed that the examiner knew that the bank expected to sustain \$2,000 loss upon the note of Donald-Lawson-Simpson, and \$2,500 on suspended and over due paper. The letter of February 16, nowhere mentions nor in any way refers to the notes or account of Donald-Lawson-Simpson, nor to a pending loss on over due paper. The directors therefore had no warning nor knowledge of the existence of the notes or account of that defunct firm.

In the letter of September 8, the comptroller advised that current expenses exceeded the bank's undivided profits by \$4,830.87. The letter of February 16, nowhere suggests that undivided profits were exhausted either by current expenses nor otherwise. There is no claim nor suggestion in the latter letter that current expenses exceeded the earnings or undivided profits or otherwise intimated that net earnings or undivided profits were impaired in any way.

These specific items of misrepresentation in the reports and books of the bank never came to the attention or knowledge of the directors, and they are not chargeable with them either by imputation, presumption or by the fact that the letter was received and suppressed by Mosher whose conduct of the business of the bank was the direct subject of the comptroller's criticism. It certainly can do plaintiffs' counsel no service to claim these items from the letter of September 8, were called to the attention of the directors, nor to base his claim of similarity between the comptroller's letter and warning to the

directors of the Saratoga bank, to the matters called to the attention of the directors here by the letter of February 16, 1892. The comptroller, on the advice of the examiner, warned the Saratoga directors that \$194,000 of specific assets of the bank were bad debts which must be collected immediately or charged out of the bank. The directors had these federal officers' word for it, at least that those assets were worthless and the failure of the bank shortly afterwards proved half of them worthless, although the directors shortly after the warning attested the report which contained all of them. The contrast in our cases is striking. The letter of February 16, did not advise the directors that any of their assets were bad nor that they must be immediately collected, nor that any amount other than that reported as charged off during the examination should still further be charged off. There is nothing in the letter which our directors saw which discredits the financial solvency of the bank nor the honesty of its executive officers, nor the correctness of the prior reports. We submit that the claimed parallel of the letters in the two different cases is not only a divergence, but is absolutely without foundation in fact.

LETTER OF SEPTEMBER 19, 1892.

The directors signed another letter to the comptroller dated September 19, 1892, although the date is lacking in the bill of exceptions, page 63. This letter is entirely unexplained in the evidence except in the letter of Mr. Thompson (B. of Ex., p. 599), where it is shown that the letter was signed by the various directors upon being presented to them for that purpose not in any meeting or even at the bank and seems to have been overlooked by the comptroller who on October 18, 1892, called upon Mr. Thompson for a reply which had already been made. The comptroller's letter of August 31, 1892, which was answered by the directors' letter of September 19, 1892, nowhere appears in the evidence so that its demands are only known through the answer of the directors. It refers to their answer of February 19, 1892, as having explained most of the matters now mentioned by the comptroller. The only matter

which the plaintiffs make any point of is that the answering letter said, "*the dividend of July 1, was all right.*" No doubt Mosher made this answer and procured signatures of the directors upon presentation wherever he could find them, depending upon their confidence in his integrity. The basis for the dividend of July 1, which the directors say was all right is shown in the minutes of the directors' meeting (B. of Ex., p. 344), where it is recited in Mosher's own hand over his own signature, "Upon the report of the president that there had been earned net in previous six months \$14,026.81, it was moved and seconded that a dividend of 4 per cent be declared and \$2,000 added to surplus account." It was upon the positive report of the president of the bank as to its net earnings that the dividend was declared without any knowledge of any director that the earnings were falsely reported or that the bank did not have the earnings with which to make the dividend. It is urgently claimed that the dividend could not be made because the letter of February 16, 1892, showed that \$30,000 had been charged off during the examination made January 26, 1892, which fell within the six months dividend period for which the dividend was made on July 12, 1892. But this does not at all follow. The \$30,000 of bad debts charged off, must have been in the bank for some time and were not profit yielding. It was from other assets than the worthless ones charged off that the earnings to make a dividend must have accrued. Simply because \$30,000 of bad debts of long standing had been charged off during the examination is no proof that the other assets of the bank had not earned the amount reported by the president, out of which, as net earnings, the dividend was declared. The directors also knew that on making the prior dividend of January 12, 1892, \$2,000 had been run to surplus and \$1,128 to undivided profits, all of which was available if it was so desired, to make the dividend of July 12, 1892, which the directors were made (in their letter of September 19, 1892) to say was all right.

At page 92, plaintiffs' brief, it is claimed that on the failure of the bank, more than four months after the letter of Sep-

tember 19, 1892, excessive loans ran high with regard to C. W. Mosher, R. C. Outcalt, their joint account, E. W. Mosher, and the Western Manufacturing Company, as if to show that that letter was known to be false by the directors at the time they signed it, where it was stated that the loans of Mosher and Small were being reduced. With C. W. Mosher in charge of the books it might readily be that E. W. Mosher's and Small's accounts were shown to be reduced at the time of the letter and were increased to the amount shown in the four intervening months to the failure. Indeed, it is not claimed that the Small loan appears at the failure and E. W. Mosher's account could readily have been increased in those four months from \$50,000 or less, up to \$107,000, claimed at the failure. It is specifically important to note that the comptroller had not mentioned as excessive loans, those of C. W. Mosher, Outcalt, nor their joint account, nor to the Western Manufacturing Company, so that the mention of those accounts above the limit at the failure in no way discredits the honesty of the directors in signing the letter of September 19, 1892.

DR. HAMER'S LETTER TO THE COMPTROLLER.

Dr. Hamer personally wrote a letter to the comptroller under date February 23, 1892, in answer to the letter of February 16, 1892, which all of the directors had seen and answered over their signature. This letter of Dr. Hamer's is vigorously used as the basis of actual knowledge of the falsity of the reports and the bad condition of the bank in plaintiffs' brief, page 93. The letter must be considered in the light of his testimony which explains what he means in saying that the manner of conducting the business for some time had not been satisfactory to him; that Mosher and Outcalt had promised improved management, and that the directors should take a more positive position in the management. Standing alone these statements might lend some color to a claim that Dr. Hamer was aware of mismanagement, but his testimony shows nothing to condemn him with any suspicion of dishonesty or untruthfulness in the business or reports of the bank, nor to discredit his belief in its solvency or soundness.

He testified concerning the letter (B. of Ex., p. 591) :

A. "Well, I went to the bank and I had a talk with the officers, chiefly with Mosher and I criticized him somewhat for not attending to it more closely and I indicated that there was too much other matters, collateral matters that he was attending to, and he said that he was now clear of the manufactory—I think I spoke of the penitentiary more particularly, the business at the penitentiary, and he said that he was out of that and indicated to me that there was but little outside of the banking business that he was connected with, and said that the banking was his business and that he was wanting to follow that up properly and that these outside affairs he would indicate he was about through with, was the substance of it."

Q. He had already sold out the penitentiary contract to Mr. Dorgan, had he not?"

A. "He said so, yes. That is my understanding."

(B. of Ex., p. 592) Q. "In what respect hadn't it (the manner of conducting the bank) been satisfactory?"

A. "Well, there was loans. Now the loan to Ed. Mosher, I didn't think that was the proper way to do and I think there was others that had got money in a similar manner. My theory was to get the matter concentrated here and not send money out west and let them put it into somebody else's hands to loan. That was what I objected to, that kind of thing. As I say, I had a talk with them and I probably promised more at the close of that because I was in favor of making a very thorough investigation. I always felt rather delicate about looking up the bank's books because I knew I didn't know very much about them."

Q. "Your idea was, it wasn't good banking to send a lot of money out into York county to be invested there at the discretion of someone else?"

A. "Why, yes, I didn't think that was proper."

(B. of Ex., p. 593) Q. "How long before you wrote this letter had this method of making loans been going on?"

A. "Well, I don't know how long they had been doing that?"

(B. of Ex., p. 594) Q. "Now in this letter to the comptroller you say: 'Your letter is a move in the right direction. It indicates that the directors should take a more positive position in the management, which I for one shall do.' Now in what respect had you failed to take a positive position prior to that?"

A. "Well, there was these matters of circulating the money out in the country and his attention was not concentrated as I thought upon the bank sufficiently."

It is claimed that he knew of the loss of \$29,000 in the account of D. L. & S., but he testified (B. of Ex., p. 597) :

Q. "Did you know that there had been a loss through D. L. & S.?"

A. "Why, I knew some of it, yes, sir."

Q. "What did you know of it?"

A. "Well, I didn't know anything definite of that particularly."

On the same page, in a long question, that loss is among other assumed losses in reference to making dividends. But because Dr. Hamer answered that long question with many assumed items in it, is no evidence that he was aware of the losses assumed in that question when he definitely states that he did not know anything about any losses in that account particularly.

Dr. Hamer's testimony concerning the substance of his letter of February 23, 1892, makes it as manifest as his former testimony did, that even in the matter of the letter he had the same confidence in the integrity of his officers and the solvency of his bank in writing the letter as he did in attesting the reports. His frankness with the comptroller and his diligence in trying to influence Mosher and Outcalt to give their attention wholly to the bank, negatives any possibility of his knowing the falsity of any report he had attested or of the insolvency of the bank, or of any dishonesty or rascality on the part of those men. The charge, first, that he knew, and the next minute, that he ought to have known the ill-fated condition of the bank, finds no encouragement in this personal letter. It is manifest that the substance of his complaint was that Mosher and Outcalt should give more exclusive attention to the business of the bank in order that the business might be increased by concentrating the business locally where it could be under their immediate attention and judgment, and not in any way to save it from insolvency or ruin.

MR. YATES WITH REGARD TO THE LETTERS.

We have heretofore quoted the testimony of Mr. Yates quite fully touching the letters as well as other matters. All of the claims against him, beginning with page 95, plaintiffs' brief, are answered by that testimony and what we have said heretofore. At page 96 it is said that he was advised of the loans to Mosher and Outcalt by the comptroller's letter. A glance at the letter will show that it does not mention any excessive loan to C. W. Mosher nor to Outcalt. Referring to loans to Mosher and Outcalt and his raising a row if he had known it, he said:

"What I understood by that was if I had knowledge that they were borrowing such large amounts of money as are reported here at the trial, I would have raised a row" (p. 579, B. of Ex.).

As to the specific references to his testimony in another case, we repeat what has been said before that the claim that he knew about six months paper being cancelled and that there would be no dividend for the period ending December, 1892, has been shown to be information which he found for the first time at the meeting of the stockholders and directors on January 9, 1893, nearly a month after he had attested his last report of December 9, 1892.

We are confident that the judgments should be affirmed because:

1. The state supreme court has correctly understood and properly enforced the rule of liability of directors provided in and based upon the national bank act.
2. The findings and judgment of the state supreme court that these directors did not knowingly attest a false report of the bank's condition nor participate in nor assent to such reports, are conclusively in accord with the evidence, and no finding of liability could be sustained by the evidence.
3. The letter of February 16, 1892, which is the only letter from the comptroller ever seen or known by these directors, did not warn them of any falsity or dishonesty in the reports

or the books of the bank, nor advise them of any bad condition endangering the soundness of the bank which they should investigate or correct.

4. These directors, in entire good faith in the truthfulness of the reports and with confidence in the soundness of the bank based on their personal observation and knowledge of its business and executive officers, attested the reports sued on, and performed their whole duty so far as it devolved upon them, without actual knowledge of any falsity and without incurring the liability of the bank act for knowing violation. They were deceived to their own loss, but are not liable as by presumption or imputation of knowledge.

5. The findings of fact of the state supreme court are not open to re-examination of the record presented on this writ.

Respectfully submitted,

FRANK M. HALL,

FRANK E. BISHOP,

Attorneys for Defendants Yates and Hamer.

March 20, 1915.



MAR 29 1915

JAMES D. MAHER

CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 501 163

JONES NATIONAL BANK, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES, D. E. THOMPSON, AND
LOUISA HAMER, ADMINISTRATRIX, ETC.

No. 502 164

BANK OF STAPLEHURST, PLAINTIFF IN ERROR,

vs.

CHARLES E. YATES, D. E. THOMPSON, AND
LOUISA HAMER, ADMINISTRATRIX, ETC.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
NEBRASKA.

**BRIEF OF DAVID E. THOMPSON, DEFENDANT IN
ERROR.**

JOHN F. STOUT,
HALLECK F. ROSE,
ARTHUR R. WELLS,
*Counsel for David E. Thompson,
Defendant in Error.*



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 501

JONES NATIONAL BANK, PLAINTIFF IN ERROR,

v's.

CHARLES E. YATES, D. E. THOMPSON, AND
LOUISA HAMER, ADMINISTRATRIX, ETC.

No. 502

BANK OF STAPLEHURST, PLAINTIFF IN ERROR,

v's.

CHARLES E. YATES, D. E. THOMPSON, AND
LOUISA HAMER, ADMINISTRATRIX, ETC.

IN ERROR TO THE SUPREME COURT OF THE STATE OF
NEBRASKA.

**BRIEF OF DAVID E. THOMPSON, DEFENDANT IN
ERROR.**

I.

Statement of the Cases.

Plaintiffs each had credit balances on deposit in the Capital National Bank of Lincoln, Nebraska, on its suspension, January 23, 1893. They sued for damages sustained by the loss of those deposits through the bank failure, on the ground that they were deceived by false reports made by

defendants, by which they were induced to make the deposits. They first sued the directors in the district court of Lancaster County, Nebraska, from which defendants removed the suits into the U. S. Circuit Court, on the ground that a federal question was involved, and where, upon demurrer, it was held that the petitions did not state any cause of action. Final judgment upon demurrer was entered in one of the cases, and, upon a writ of error, that judgment was affirmed in the Circuit Court of Appeals of the 8th Circuit, on the ground that the petition stated merely a cause of action "for the misfeasance and mismanagement of the affairs of the bank by the defendants as its officers and directors," which was adjudged to be an asset of the bank "belonging equally to all the creditors in proportion to their respective claims," and which "cannot be appropriated in whole or in part by a single creditor to the exclusive use of his own claim." (*Bailey v. Mosher*, 63 Fed. 488-491.)

The cases in which final judgments had been withheld, pending the ruling of the Circuit Court of Appeals, were thereupon dismissed, and the plaintiffs brought the present suits, in February, 1895, in Seward County, Nebraska. The present suits were also removed to the federal court, and were by SHIRAS, D. J., remanded to the state court. (*Bailey v. Mosher*, 74 Fed. 15.) Plaintiffs then amended their petitions in the state court, whereupon there was a second removal, and the cases were this time retained by SHIRAS, D. J., (*Bailey v. Mosher*, 95 Fed. 223) who rendered judgment in favor of defendants upon a demurrer to the petition; and this judgment was, in turn, reversed by the Circuit Court of Appeals, on the sole ground that the first removal petition had by the order remanding the case, become *functus officio*, and that the second petition was too long delayed (*Jones v. Mosher*, 107 Fed. 561.) The existence of the federal right and the controlling force of the federal statute have since been authoritatively determined.

In May, 1902, the cases went to trial to a jury in Seward County, Nebraska, where defendants suffered adverse judgments, through error of the trial court in denying effect to a governing federal statute. The Supreme Court of Nebraska also committed error in denying the application of the federal statute, and affirmed the judgments entered by the trial court. (*Yates v. Jones National Bank*, 74 Neb. 734.) In so ruling, however, the State Supreme Court felt itself bound by its former ruling upon the controlling question in *Gerner v. Mosher*, 58 Neb. 135; and on affirming the judgments did itself the justice to say: "We do not wish to be understood to say that all the defendants *knew* that such statements were false. We are satisfied that such is not the case. But * * * the fact that they made and published them without knowledge of their falsity is no defense." (*Yates v. Jones National Bank*, 74 Neb. 740.) The judgments were then reviewed in this court, where the unanimous opinion by the present Mr. CHIEF JUSTICE definitely determined the controlling force of the federal statute and the non-liability thereunder of all directors who had not *knowingly* made or *knowingly* permitted falsifications in the reports of the bank to the Comptroller of the Currency, which had been published, and which were the basis of the complaints. (*Yates v. Jones National Bank*, 206 U. S. 158-181; *Yates v. Bank of Staplehurst, Utica Bank, and Bailey*, 206 U. S. 181-185.)

When the cases, pursuant to the mandates of this court, ultimately reached the trial court again, the parties stipulated to waive a jury and to have the cases heard and determined by the court. Judgments aggregating \$68,622.15, were rendered in favor of plaintiffs May 8, 1911. The aggregate of the two judgments to which Mr. Thompson was party was \$42,799.78. The Supreme Court of Nebraska reversed these judgments on the sole ground, as we understand, that there was not sufficient evidence in the record to sustain them. There was no proof that defendants made any oral representations, or that they made any

written representations other than to attest some official reports. The judgments had no support, therefore, on non-federal grounds. In respect to the official reports attested by *Mr. Thompson*, there was no proof that he *knowingly* made or *knowingly permitted* the making of a false report, as is necessary under Sec. 5239 Rev. Stat. U. S.; and for want of proof of a *scienter* required by that statute, the judgments of the trial court were reversed. (*Jones National Bank v. Yates*, 93 Neb. 121-131.)

Defendants are only charged, specifically, by the petitions of plaintiffs, with having made and published two false reports to the Comptroller of the Currency. One paragraph charges that on the *9th day of December, 1892*, defendants "made, caused, allowed and permitted a false statement of the condition of said bank and its resources and liabilities, which statement is hereto attached and marked 'Exhibit A.' " Another paragraph alleges that on the *28th day of December, 1886*, the defendants "made caused, allowed and permitted to be made a false statement of its resources and liabilities, a copy of which statement is hereto attached and marked 'Exhibit B.' " In the same connection it was averred that these statements were published in newspapers. Exhibit A does not bear the attestation or name of Mr. Thompson. It purports to be a report of the Capital National Bank at the close of business December 9, 1892. Exhibit B purports to be a report of the Capital National Bank at the close of business December 28, 1886, and bears the name of D. E. Thompson as one of three attesting directors.

There is no allegation in the petition that the Capital National Bank was a national banking association, or that the acts, or any of the acts complained of, were done by defendants as directors of a national banking association. There is no allegation that either of the exhibits referred to was a report made to the Comptroller, or that it was published as such pursuant to the National Banking Act. The name or title of the Comptroller of the Currency does

not appear in either exhibit. The absence of such averments, and the failure to claim any right under any federal statute, were the result of studied adroitness to produce a petition that would prevent removal into the federal court of the district, where plaintiffs would face an adverse precedent, and which was regarded as an unfavorable forum. In advocacy plaintiffs' counsel have repeatedly counted on the elimination of all references to the National Banking Act. Viewed in this aspect it is obvious that, on the pleadings, plaintiffs can claim no federal rights unless such claim may be based on Exhibits A and B in their petitions. In connection with this explanation we now quote in full the paragraph of the petition of the *Jones National Bank* which immediately follows the averments touching Exhibits A and B:

"This plaintiff avers that on and between July 23rd, 1884, and January 21st, 1893, the defendants, with the fraudulent intent and purpose as aforesaid, during all of said time, made, allowed, caused and permitted to be made at divers intervals, false statements of the condition of said bank as to its resources and liabilities, with the intent and purpose of deceiving the plaintiff and others, as aforesaid, and caused, acquiesced in, allowed and permitted said false statements, and each of them, severally to be published in newspapers of general circulation in the City of Lincoln, Nebraska, which said papers aforesaid were of general circulation in the State of Nebraska, and sent and caused to be sent to and received by plaintiff said false statements aforesaid, through the U. S. Mails, and otherwise, and which were received by plaintiff." (Printed Record, *Jones National Bank Case*, pp. 4, 5.)

The trial judge's findings assert that these averments were intended to relate to unofficial and voluntary acts, by which advertisements and statements of an unofficial character were employed to solicit business. They certainly charge no fault with any official statement to the Comptroller of the Currency, which was published under command of the federal statute, and they fail to specify any

such statement, or set forth its terms. By the accepted rules of pleading, averments charging fraud in written representations are defective in substance unless they set forth the specific terms of the writing. There is no substantive averment of false official written reports found in the petition, on which a judgment in favor of plaintiffs could rest, or on which plaintiffs have standing to be heard in this court, outside of the two statements embraced in Exhibits A and B of the petitions. The report of December 28, 1886, Exhibit B, which purports to bear the attestation of Mr. Thompson, was too remote, in point of time, to operate as an inducement for deposits made in the bank in 1893. While this is a necessary legal inference, the plaintiff's officers testified unequivocally to the same effect. Any cause of action based upon the statement of December 28, 1886, had, also, been long barred by the four years' limitation of the Nebraska Statute. The report of December 9, 1892, does not purport to have been attested by Mr. Thompson, and the proofs are that he had no connection with it in any manner.

In certain particulars error is assigned upon the phraseology of the opinion of the State Supreme Court. Assignments 3, 4, 11 and 19 complain of the omission of the qualifying phrase "in effect" in the Court's reference to the holding of this court, that "something more than negligence is required, and it must be shown that the violation was (in effect) intentional." But this omission or inaccuracy is without significance, since the court was not approving or passing upon any rule or charge by which the trial court or jury was to be guided in finding the facts. The cases were, by stipulation, tried to the court without a jury. In a trial so had the only ultimate question presented to the reviewing court is: Was the judgment rendered correct, upon the pleadings and the evidence competent to be considered? And, in any event, it is clear that the judgments of reversal, now under review, were not rested upon any such narrow refinement, but solely

upon the fact that the evidence, upon the view of the law most favorable to plaintiffs, did not prove a *scienter*.

Assignments of error 12, 15 and 16 (and also 14, which is not directed against *Mr. Thompson*) present the claim that certain letters from the Comptroller furnish conclusive evidence that defendants knowingly permitted the making of false official reports to the Comptroller. The significance of the Comptroller's letters referred to, in the light of the oral testimony, are by no means what is claimed by plaintiffs in error. But in this aspect the separate case of *Mr. Thompson* divides from the cases of the other defendants. In calling attention to this divergence we do not question the merits of the defense made by the other defendants. No analysis or discussion of the Comptroller's letters is called for from *Mr. Thompson*, because they do not bear upon his separate case. This is proved by the following undisputed facts:

The earliest letter from the Comptroller is dated at Washington, September 8, 1891. The latest report attested by *Mr. Thompson* is of date July 9, 1891. The latter date was two months prior to the Comptroller's first letter, of September 8, 1891, which called attention to an intervening report of August 19, 1891, that *Mr. Thompson* had not attested. Obviously the letter written at Washington on September 8, could not operate as a vehicle to carry knowledge home to *Mr. Thompson* at Lincoln, Nebraska, at the prior date of July 9, the last occasion on which he ever attested a bank report. The same consideration excludes application of the subsequent letters to the case of *Mr. Thompson*. We shall later show, by record references, that *Mr. Thompson* did not participate in any subsequent report and that his nonparticipation is established, incontrovertibly, and without dispute or contradiction.

Pursuant to a provision of the Nebraska Code, *Mr. Thompson* made several requests of the trial court for special findings, among which was No. 5, as follows:

"Whether this defendant in fact participated in any of the official reports made by the Capital National Bank to the Comptroller of the Currency, other than the five several reports dated respectively December 28, 1886, August 1, 1887, October 2, 1890, December 10, 1890, and July 9, 1891?" (Printed Record, *Jones National Bank Case*, p. 23.)

The foregoing request was answered by the trial court as follows:

"Respecting the fifth request, the court finds that the defendant Thompson attested only five reports mentioned in said request." (Printed Record, *Jones National Bank Case*, p. 27.)

Mr. Thompson's 6th and 7th requests for special findings were as follows:

"6. Whether in attesting such of the official reports of the Capital National Bank to the Comptroller of the Currency as are shown to have been attested by him, the defendant acted in good faith?

"7. Whether in attesting such of the official reports of the Capital National Bank to the Comptroller of the Currency as are shown to have been attested by him, the defendant acted fraudulently, and with actual personal knowledge that such reports, or any one of them, were, in any material respect, false and untrue?" (Printed Record, *Jones National Bank Case*, p. 23.)

The trial court answered these two interrogatories as follows:

"Respecting the sixth and seventh requests of the defendant the court finds that the defendant had no actual personal knowledge of the truth or falsity of the reports made to the Comptroller, attested by him, *but in attesting such reports the court finds that the defendant relied upon the statements made to him by the president and cashier of the bank*, and without any investigation, and that at the time of attesting such statements the defendant knew that he had no personal knowledge of the truth or falsity

of such reports, and that the same were attested recklessly and without performing his duties as a director to ascertain the truth or falsity of such reports before the same were attested by him, and, in this respect, the court finds the same were not made in good faith." (Printed Record, p. 27.)

That the last quoted finding, as a basis of liability on the official reports, was wholly insufficient, was conceded by the trial court. The doctrine that a director is civilly liable, if he attested an untrue report "because he did so at his risk, since it was his duty to know, or to refrain from acting," was expressly repudiated in the opinion reversing the previous judgments in these identical cases (*Yates v. Jones National Bank*, 206 U. S. 179, 180.) in which it was said, "That this imposed a higher standard of conduct than was required by the statute, is obvious."

Two ultimate facts are established by the finding: (1) Mr. Thompson's innocence of the falsehood, and (2) a justifiable ground for the attestation, in the circumstance that "in attesting such report the court finds that the defendant relied upon the statements made to him by the president and cashier of the bank." The only thing here found against Mr. Thompson is that he relied on the statements of the managing officers of the bank "without performing his duties as a director to ascertain the truth or falsity of such reports before the same were attested by him." It was "in this respect," only, that the court found against his good faith. He had, according to the finding, gone for information on this precise subject, to the president and cashier, and had relied on their statements. He is found guilty of no intentional falsehood, and the attempt to impute falsehood is not rested on any admissible ground, consistent with the provisions of the National Banking Act. So the proposition found and stated by the court was the exploded theory that the director, despite his diligence in making inquiry touching the correctness of the report, from a source which he regarded creditable, and upon which he

in fact relied, should be held liable if the report turned out, ultimately, to be false, because he acted at his peril and it was his duty to know or refrain from acting. If Mr. Thompson had undertaken the tedious task of checking the accounts of the bank, he would, under this exploded theory, be civilly liable if he failed to discover frauds concealed by false entries. But it was undisputed that Mr. Thompson had no knowledge of bookkeeping or accounting, and that it would have been an impossibility for him to have derived any information from an examination of the accounts. He took the only course available to him, of making inquiries of those who had knowledge of the bank's affairs superior to his own; and he trusted the verity of their statements.

The trial court recognized the force of the above suggestions, and announced, as a conclusion of law, that plaintiff was entitled to recover "under the principles of the common law, *exclusive* of the requirements of the national banking act." (Printed Record, *Jones National Bank Case*, No. 501, pp. 28, 44.) This exclusion of the federal statute seemed to be a repetition of the identical error that had reversed the former judgments. Thereupon Mr. Thompson in order to draw from the court an expression of the theory on which he was held liable, presented for special findings or conclusions of law the following, among other interrogatories:

"3. Is the liability of this defendant for deceit or false representations under the principles of the common law, as determined by the court, founded or based upon the defendant's attestation of the official reports to the Comptroller of the Currency of the resources and liabilities of the Capital National Bank, of dates respectively, December 28, 1886, August 1, 1887, October 2, 1890, December 19, 1890, and July 9, 1891, or any one or more thereof?

"4. What are the particular written false representations made by this defendant, which form the basis or foundation for the legal conclusion that this defendant is liable for deceit or false representations *under the principles*

of the common law." (Printed Record, *Jones National Bank Case*, pp. 24, 25.)

To the foregoing the trial court made the following answers:

"Respecting the *third* interrogatory, the court finds as a conclusion of law that the liability of the defendant, David E. Thompson, in an action of deceit under the principles of the common law, is not founded upon the attestation of the official reports referred to in the third interrogatory; but that such statements are corroborative of the *unofficial* and *voluntary* statements made by the bank, as set forth in the answers to the first and second additional interrogatories, and that such liability is founded upon the truth of the allegations of plaintiffs' amended petition, and embodied in the general findings of the court.

"In answer to the *fourth* interrogatory the court bases or founds its legal conclusion, as to defendant David E. Thompson's liability, upon the statements, representations and advertisements setting forth the financial condition of the bank which were published in the newspapers, and such as were sent by the bank to the plaintiff in the form of cards and slips, and purporting and assuming to have been made, compiled, issued, published and circulated under the authority and direction of the directors of the Capital National Bank, and in the name of the defendant David E. Thompson, with the other directors, and that such statements, representations and advertisements were false, and known to be so by the defendant, and were relied upon by the plaintiffs to their damage." (Printed Record, *Jones National Bank Case*, p. 44.)

We have previously quoted the special finding that Mr. Thompson *did not know* that the official reports which he attested were false, and that he attested them on information that they were true, and on which he relied, obtained from the president and cashier, who had knowledge superior to his own. The trial court thus definitely placed responsibility on *voluntary unofficial* statements alleged to have been sent to plaintiffs, or inserted in newspaper advertis-

ing, for the solicitation of business. There was not, in the voluminous record, a scintilla of evidence connecting *Mr. Thompson*, in any particular, with any writings of the character specified. So far as the evidence was concerned, the recital which seeks to fasten liability on *Mr. Thompson*, upon a ground independent of the federal statute, was pure fiction. The attestation of four or five reports, made after first making inquiry touching their correctness, and without knowledge of their falsity, as the court found, was the only connection shown by the proofs of *Mr. Thompson* with any matter charged against him by the pleading.

Touching the charges of oral or verbal misrepresentations, *Mr. Thompson* made requests for special findings to which the trial court responded as follows:

"In respect to the second and third requests of the defendant *David E. Thompson*, the court finds that the evidence does not show that said defendant made any oral statements or representations touching the pecuniary worth, standing or responsibility of said bank to the plaintiff, and further finds that plaintiff was not induced or influenced by any such oral statements of said defendant to deposit any funds in the Capital National Bank." (Printed Record, *Jones National Bank Case*, p. 27.)

In No. 9 of the errors assigned, complaint is made that the State Supreme Court decided that section 5239, Rev. Stat. U. S., precluded maintenance of an action for deceit based on voluntary acts of directors outside of duties enjoined by the National Banking Act. This assignment is unavailing for three reasons: (1) The decision of the State Court upon a cause of action not arising under a federal statute is not subject to review by this court, (2) there was no evidence to sustain any cause of action upon a non-federal ground, and (3) the judgment of the State Supreme Court is not rested on the assigned ground, either wholly or partially.

Other assignments present the complaint that the State Supreme Court decided that the petitions of plaintiffs in

error did not state a cause of action; but the judgments were not rested, in whole or in part, on such ground.

The immateriality of all of the assignments of error and the complaints based upon particular expressions found in the opinion of HAMER, J., become apparent, when it is observed that the sole ground upon which LETTON, J., concurred in the judgments of reversal, was that a case had not been made by sufficient evidence, under the rule of liability established by the decision of this court. It was on this ground, *alone*, that the judgments of reversal had the concurrence of a constitutional majority of the judges of the State Supreme Court. This consideration eliminates every consideration, other than the sufficiency of the record to warrant the conclusion announced on the insufficiency of the evidence to establish a *scintilla*. References to the opinions of the judges of the State Supreme Court, conclusively establishing this point, are made under an appropriate head in the argument.

II.

A single creditor cannot maintain an action against the directors of a corporation for recovery of damages for neglect or mismanagement, whereby the corporation sustains losses and becomes insolvent. Such cause of action is for a wrong done to the corporation and the whole body of the corporate creditors, and can only be maintained by the corporation or its receiver.

The petitions, or complaints, of plaintiffs in error are loaded, excessively, with surplusage and irrelevant averments. Included in the surplusage, are averments that it was the duty of defendants as directors to actually and actively manage the business of the bank; that defendants neglected the duties of active administration, by reason of which large loans were made to insolvent persons upon inadequate or no security; and that insolvency "resulted

from the careless and negligent manner in which the defendants, acting as such directors and officers, managed and superintended the bank and its said business." (Printed Record, *Jones National Bank Case*, No. 501, p. 3). It is also alleged (Printed Record, Case No. 501, p. 7) that "on the 21st day of January, 1893, said bank suspended and went into the hands of a receiver."

The brief of plaintiffs in error contain repeated suggestions that defendants were neglectful of their official duties. Both averments and arguments addressed to this charge are pointless. The representative or fiducial duty of the director is to the corporate body only, and not to the individual creditor. A breach of that duty is a wrong to the corporation only, and incidentally to the whole body of its creditors, and is not a personal wrong to the individual creditor. The remedy is a suit in equity by a receiver for an accounting, and for a ratable distribution of any recovery, *first*, to all the creditors, and *second*, to all the shareholders. (*Hornor v. Henning*, 93 U. S. 228.)

Here individual creditors sue in their own behalf, only, and must rely upon a wrong that is personal to the individual plaintiff, and not common to all the creditors. That the bank was being liquidated through a receivership, is alleged in the petitions. Allegations and proofs of mere neglect to discharge an official duty to the *corporation*, to personally manage and conduct its affairs so as to avoid pecuniary losses to the *corporation*, do not reach or affect the cause of action of an individual creditor. They do not support the personal claim of an individual creditor, based upon a charge that he was deceived by false representations. The claim based upon allegations of deceit is purely personal to the individual plaintiff. It can only be sustained by proof that false and deceitful statements reached him personally, and influenced his individual transactions. Proof of mere failure of the director to act in an administrative capacity, does not sustain a charge that the director made deceitful statements to the

plaintiff. This point is, therefore, presented briefly in order to eliminate the immaterial issue.

The identical issue was adjudicated by the Circuit Court of Appeals of the Eighth Circuit in the suit of *Thomas Bailey*, one of the present plaintiffs in error, against the present defendants in error, on the identical claim here in question. *Bailey v. Mosher*, 63 Fed. 401. CALDWELL, C. J., expressing the unanimous opinion of the court in that case, said:

"The petition shows that the bank of which the defendants are officers and directors is insolvent, and has passed into the hands of a receiver appointed by the comptroller of the currency under the national banking act. The liability of the defendants, whatever it may be, for the acts complained of in the petition, is an asset of the bank, belonging equally to all the creditors in proportion to their respective claims, and cannot be appropriated, in whole or in part, by a single creditor to the exclusive payment of his own claim. It is the policy of the national banking act to secure the ratable distribution of the assets of an insolvent national bank among all its creditors. Assuming that the defendants are liable in damages for the acts complained of in the petition, they are liable at the suit of the receiver, who is the statutory assignee of the bank, and the proper party to institute all suits for the recovery of the assets of the bank, of whatever nature, to the end that they may be ratably distributed among its creditors. Rev. St. U. S. Sec. 5234; *Kennedy v. Gibson*, 8 Wall. 408; *Bank v. Colby*, 21 Wall. 600; *Hornor v. Henning*, 93 U. S. 228; *Stephens v. Overstoltz*, 43 Fed. 771; *Bank v. Peters*, 41 Fed. 13. The law will not allow one creditor to appropriate the whole liability of the directors to his own benefit. It is well settled that an injury done to the stock and capital of a corporation by the negligence or misfeasance of its officers and directors is an injury done to the whole body of stockholders in common, and not an injury for which a single stockholder can sue. *Smith v. Hurd*, 12 Metc. (Mass.) 371; *Howe v. Barney*, 45 Fed. 668. The same rule applies to the creditors of a corporation."

When the present suits were previously before the Supreme Court of Nebraska, defendants argued that the ruling of the Circuit Court of Appeals in *Bailey v. Mosher*, above quoted, should be applied to the present petitions; and this argument was answered in its opinion in *Yates v. Jones National Bank*, 74 Neb. 739, as follows:

"One of the principal contentions of the defendants, reduced to its simplest form, is as follows: (1) Damages resulting to a national bank from the misfeasance or mismanagement of its officers are assets of the bank, and are recoverable of such officers only in an action brought by the bank, or for the benefit of all the stockholders and creditors. (2) The damages alleged in the petition resulted to a national bank from the misfeasance and mismanagement of its officers. (3) Therefore, such damages are assets of the bank and are recoverable only in an action brought by the bank, or for the benefit of all the stockholders and creditors. The major premise is so nearly a self-evident proposition that it requires no elaboration. It is recognized in *Bailey v. Mosher*, *supra*, and in the cases there cited. But we are not disposed to accept the minor premise. It is true the petitions show misfeasance and mismanagement on the part of the defendants as officers of the bank, and that the bank thereby sustained damages, but they show more than that. They show that the defendants made and published false and misleading statements concerning the financial condition of the bank, whereby the plaintiffs were induced to become and remain its creditors to their damage. In short, whatever other allegations may be contained in the petition they also contain sufficient to constitute a common law action for *deceit*."

To avoid the conclusive force of the former judgment as a bar to the prosecution of the present suits, it was necessary to construe the present petitions as presenting only causes of action for *deceit*, and to exclude as *surplusage* all of the averments charging mere *neglect* and *misfeasance*. The Supreme Court of Nebraska approved of the doctrine maintained by Judge CALDWELL in *Bailey's*

Case as being "so nearly a self-evident proposition that it requires no elaboration."

In *Yates v. Bailey*, 206 U. S. 181-185, this court approved of the interpretation placed upon the present pleadings in *Yates v. Jones National Bank*, 74 Neb. 739. Otherwise the action of Bailey must have been concluded by the former judgment pronounced in the Circuit Court of Appeals for the Eighth Circuit.

Apart from the cited cases, connected with the present suits, the rule is well-nigh universal that an individual creditor cannot recover for a wrong done to the corporation through the neglect or misfeasance of a director. (*Hornor v. Henning*, 93 U. S. 228; *United States Fidelity & G. Co. v. Corning St. Sav. Bank*, 154 Iowa 588, 134 N. W. 857-860, and authorities cited in the opinion.)

The doctrine that one creditor of a corporation cannot recover and appropriate to his separate use, in an action in his own name, the proceeds of a cause of action for an injury or wrong done to the corporate body, has been repeatedly recognized and applied to cases arising under the National Banking Act. The scheme of liquidation adopted by that act is intended to secure an equal and ratable distribution among all of the creditors of a failed bank, and requires such suit to be prosecuted by the bank while it remains in operation, or by its receiver in event of its suspension. (*Conkey v. Halsey*, 44 N. J. L. 463, 464; *Kennedy v. Gibson*, 8 Wall. 506; *Cockerell v. Cooper*, 86 Fed. 13; *Davis v. Elmira Savings Bank*, 161 U. S. 284; *National Bank v. Colby*, 21 Wall. 609, 613, 614; *Bailey v. Mosher*, 63 Fed. 491.)

The application of this doctrine eliminates, as surplage, all averments and proofs of neglect and misfeasance, as independent grounds for maintenance of the present suits, and renders their exploitation in the briefs and arguments of plaintiffs in error altogether purposeless and pointless.

III.

The decision of the state Supreme Court rests, exclusively, on a finding of fact, that the evidence in the record is not sufficient to show that defendants knowingly made or knowingly permitted the making and publishing of false official reports. Upon that issue plaintiffs had the burden of proof; and upon a finding of pure fact depends the applicability of Sec. 5239 U. S. Rev. Stat. and the federal right now asserted thereunder.

When the cases were reviewed here on the previous writs of error, the present Mr. CHIEF JUSTICE, expressing the unanimous opinion of the court, said:

"It thus becomes obvious that the national bank act imposes upon directors duties which would not rest upon them at common law, and that among such duties is the furnishing to the Comptroller of the Currency reports concerning the condition of the bank and the publication thereof. Although the statutory provisions subsequent to the act of 1863 relating to making and publishing of such reports do not, as did the act of 1863, expressly require that the report, when made, should contain a 'true' statement of the condition of the association, yet, by necessary implication, such is the character of the statement required to be made, and by the like implication the making and publishing of a false report is prohibited.

"Considering the text of the national bank act, as now embodied in the Revised Statutes, including Sec. 5239, we think the latter section affords the exclusive rule by which to measure the right to recover damages, from directors, based upon a loss alleged to have resulted solely from the violation by such directors of a duty expressly imposed upon them by a provision of the act. By the first sentence of the section mentioned a forfeiture of the charter is entailed 'if the directors of any national banking association shall knowingly violate or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of this title.' And the last sentence ordains the rule by which civil liability is to be determined.

by providing that 'every director who participated in or assented to the same shall be held liable in his personal and individual capacity for all damages which the association, its shareholders, or any other person shall have sustained in consequence of such violation.'

"As the section thus comprehends all the express commands to do or not to do, as to directors, contained in the national bank act, and besides specifies the nature of the conduct of directors from which their civil liability for violation of such commands may arise, it results that liability cannot be entailed upon them by exacting a different and higher standard of conduct as regards such commands than that established by the statute, without depriving directors of an immunity conferred upon them. That the words 'shall knowingly violate or knowingly permit' etc., found in the first sentence of Sec. 5239 Rev. Stat. were intended to express the rule of conduct which the statute established as a prerequisite to the liability of directors for a violation of the express provisions of the title relating to national banks, is additionally shown by the oath which a director is required to take, wherein, as already stated, he swears 'that he will, *so far as the duty devolves on him*, diligently and honestly administer the affairs of such association, and not knowingly violate or willingly permit to be violated, any of the provisions of this title.' Mark the contrast between the general common law duty to 'diligently and honestly administer the affairs of the association, and the distinct emphasis embodied in the promise not to 'knowingly violate or willingly permit to be violated, any of the provisions of this title.' In other words, as the statute does not relieve the directors from the common law duty to be honest and diligent, the oath exacted responds to such requirements. But, as on the other hand, the statute imposes certain express duties and makes a knowing violation of such commands the test of civil liability, the oath in this regard also conforms to the requirements of the statute by the promise not to 'knowingly violate, or willingly permit to be violated, any of the provisions of this title.'" (*Oates v. Jones National Bank* 206 U. S. 158, 1. c. 176-178.)

The exposition in the opinion of the doctrine that the rule of the federal statute is supreme and exclusive, concludes as follows:

"The frustration of the public policy embodied in the national bank system by the crippling of the usefulness of such institutions, which would result from holding that directors, in performing the duties imposed upon them by the national bank act, might be held liable civilly, not by the standard of conduct which the act provides for a violation of its express commands, but by another and different one, is apparent. Under such a conception it might well be that prudent and responsible persons would decline to assume the discharge of duties imposed by the statute, because of the hazard of an uncertain pecuniary liability which the statute imposing the duty did not contemplate." (*Yates v. Jones National Bank*, 206 U. S. 158, 1 c. 176-178.)

Explaining in what particulars, and how far, the state court, in the proceedings under review, departed from the rule of the federal statute, the opinion states:

"The error in the decision below becomes at once apparent when its correctness is tested by the rule that the statute is applicable and prescribes the exclusive test of liability. The doctrine, as we have seen, upon which the court below rested its judgment, was that directors of a national bank who merely negligently participated in or assented to the making and publishing of an untrue official report of the condition of the bank were civilly liable to anyone deceived, to his injury, by such report. Indeed, in one aspect, the ruling below went further than this, since it was, in substance, decided that, despite the exercise of diligence by the director, if he attested an untrue report he was civilly liable, because he did so at his risk, since it was his duty to know or to refrain from acting. That this imposed a higher standard of conduct than was required by the statute is obvious, but is clearly also established by previous decisions of this court pointing out that where by law a responsibility is made to arise from the

violation of a statute knowingly, proof of something more than negligence is required; that is, that the violation must in effect be intentional. *McDonald v. Williams*, 174 U. S. 397; *Potter v. United States*, 155 U. S. 438, 449, and cases cited. See also *U'Hev v. Hill*, 155 Mo. 232, and cases cited." (*Yates v. Jones National Bank*, 206 U. S. 158, 1 c. 176, 180.)

The judgments of the Supreme Court of the State were accordingly reversed and the causes "remanded for further proceedings not inconsistent with this opinion." The expositions of the statute above quoted were thus made instructions to the Supreme Court of the State to be followed in the further proceedings to be had pursuant to the mandate of this court. The court below, in the further proceedings, endeavored to obey these authoritative directions which determined the law of the cases.

The theory presented by the plaintiffs in error and adopted by the district judge who subsequently heard the the cases, without a jury, in the district court of Seward County, Nebraska, was, obviously, a perversion and circumvention of the directions of this court. In the case of Ambassador Thompson, whose brief we hold, the record presented to the State Supreme Court exhibited an absolute and total failure of any evidence to show that he knowingly made or knowingly permitted the making and publication of false official reports to the Comptroller of the Currency of the condition of the Capital National Bank. That charge, which was the sole ground of liability under the federal statute, and upon which alone the jurisdiction of this court depends, was wholly unsupported. The judgment of reversal was inevitable, and was forced upon the state supreme court by the failure of proof of an essential and indispensable element of the cause of action. The opinion of this court threw the burden of proving a *scienter* on plaintiffs, and that burden, as we shall conclusively show, was not sustained by plaintiffs. Had the State Supreme Court so far disregarded the man-

ate from this court as to affirm the judgments of the district court of Seward County, on a record wholly wanting in proof of a *scienter*, a second reversal by this court on writs of error sued out by defendants would have been required to enforce obedience to its previous judgment and mandate.

It is true the court below was divided. The associates of the Chief Justice in the State Supreme Court ruled that he had been guilty of usurpation in participating in the proceedings to award a rehearing, after he had publicly announced that he had been counseled by one of the plaintiffs and had previously withdrawn, leaving the disposition of the case to his associates; and the incident is brought into the record in this court. But the present writs of error only present for review the merits of the ultimate judgments rendered below, and this aspect of the record will be neither edifying nor useful upon this hearing.

The aspect of the argument presented by plaintiffs in error in the State Supreme Court is set out in the opinion of Holmes, J. (*Jones National Bank v. Yates*, 93 Neb. 127, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000).

"The opinion of Justice White in *Yates v. Jones National Bank*, *supra*, is based on a single proposition: that is: 'Where a statute creates a duty and prescribes a penalty for non-performance, the rule prescribed in the statute is the exclusive test of liability.' In the argument on behalf of the appellees (the plaintiffs in error here) it is said: 'We sought to avoid the application of this rule for the reason that, while the national bank act expressly commanded the publication of the official report, it did not require the publication of a *true* report, and that therefore the publication of a *false* report did not violate any express mandate of the statute.' * * * The argument was that the making of a *false* report was not a violation of the United States bank act, and that the remedy provided by section 5230 for violations of the statute did not

reach the case, and therefore the contention was that there was no statutory remedy for making a *false* report, and that the plaintiffs below could resort to this remedy at common law."

In other words, it was argued below that the decision of this court that the rule of the federal statute governed, was erroneous and should be disregarded, and that the lower court ought to adhere to the error which led to reversal of its former judgments.

Judge S. J. of the state court, concurred in the judgment of reversal, but filed a separate opinion in which he expressed his personal approval of the argument *that the statute did not control*, and stated that he yielded only to the superior power of this court. His opinion states:

"I agree with the former judgment of this court, and that of the several inferior tribunals before which the question was presented that the petitions state a cause of action at common law for deceit, but think this court is bound by the opinion of the Supreme Court of the United States."

Under the holding of the Supreme Court of the United States as to the measure of duty and of liability of directors under the banking laws of the United States, I think a case has not been made. For that reason, alone, I concur in the conclusion." (*First National Bank v. Yates*, 93 Neb. 131; Printed Record, Case No. 301, p. 55.)

The reason assigned by Judge LEROY for concurring in the reversal is certainly valid. There is not the slightest doubt that the court below reversed the judgments because of the total want of proof of a *scienter*, which is now an element of the cause of action by the federal statute. Under the state constitution the concurrence of four judges is necessary in order to pronounce a decision. So long maintained in the opinion of HAYNE, J., therefore, became the *division* of the court, except the single vote delivered in by LEROY, J. that under the measure of

liability defined by the Supreme Court of the United States "a case has not been made" against defendants by the evidence. It was upon this sole ground that Judge LETTON concurred in the judgment of reversal, and to the point the opinion by HAMER, J., addressed the following:

"Coming now to the consideration of the additional evidence introduced upon the second trial of these cases, we are of opinion that it is insufficient to charge the defendants with a personal liability for fraud and deceit. The testimony is clear, and practically without dispute, that when Yates and Hamer signed the reports of December 9, 1892, and December 28, 1886, which are the ones on which this action is in fact predicated, neither of them had any personal knowledge of their falsity, but signed them in good faith, believing that they exhibited the true condition of the Capital National Bank. It is not shown that either Yates or Hamer had any communication or conversation with the plaintiffs or any of them, in regard to the condition of the Capital National Bank. It is not shown that they or either or them had any knowledge that any published statements or cards containing any information as to the condition of the bank were ever sent to the plaintiffs, or any of them by any officer or agent of the bank.

"It follows, therefore, that the evidence is insufficient to charge them, or either of them, *with ever having knowingly* made any false statement in regard to the condition of the bank, or participated in sending any advertising manner, published statements, or any of the things mentioned in the plaintiffs' petition, to them or any of them; and having taken no part in said transactions, it cannot be said that they knowingly participated in any of them. There being nothing in the record sufficient to bring defendants Yates and Hamer within the rule of liability announced by the Supreme Court of the United States, in these cases and others, we are of opinion that the judgment as to them must be reversed.

"As to the defendant David E. Thompson, it appears from the record that he did not sign either of the statements in question. Some evidence was introduced which tends to show that before the last report was signed Thompson had notice of a letter from the Comptroller of the Currency questioning the correctness of former reports made to him by the directors, and requiring the bank officers to charge off certain worthless notes or obligations held by that institution; that thereafter Thompson refused to sign any statements to the Comptroller of the Currency, and took no part in the management of the bank; that he disposed of some of his stock; that he was not informed in any way of the fact that published statements of the condition of the bank were sent by any agent or officer of the bank to the plaintiffs, if any such were sent. While it may be said that for a considerable length of time before the bank was closed by the Comptroller he had some knowledge that its financial condition was questioned, still, so far as the record shows, defendant Thompson did not personally participate in any of the acts of which the plaintiffs complain, and they do not claim that he ever had any conversation with or made any statements whatever to the plaintiffs or any of them." *Jones National Bank v. Yates*, 93 Neb. 125, 126. Printed Record, *Jones National Bank*, Case No. 501, pp. 51, 52, 3.

Concluding the opinion with a general restatement of the reasons for entering judgments of reversal, HAMER, J., said:

"The plaintiffs having failed to allege and prove that the defendants personally knew of or personally participated in the acts of the officers of the bank of which they now complain, it seems clear that, if we follow the decision of the Supreme Court of the United States in these cases, they are not entitled to recover, and the judgments

*NOTE: The summary of the ultimate facts shown by the evidence touching the case of Ambassador Thompson contained in the quoted opinion of the lower court, is not, in all respects, entirely faithful to the record. It does not do Mr. Thompson's case, on the record, full justice, as we shall later show; but it is, nevertheless, a finding of the insufficiency of the evidence.

of the district court should be reversed as to all the defendants." (*Jones National Bank v. Yates*, 93 Neb. 130, Printed Record, No. 501, p. 55.)

That the opinion of HAMER, J., and the concurring opinion of LITTON, J., evidence a purpose to apply the law as settled by the judgment of this court, and to obey the directions embodied in its mandate, is obvious. By the decision of this court the liability of the defendants in error, under section 5239 of the Revised Statutes, depends wholly upon whether the defendants were shown to have *knowingly* made or *knowingly permitted* the making and publication of the false official reports of which complaint is made. On this decisive issue of fact the State Supreme Court found specifically in favor of defendants, and that the issue tendered by plaintiffs that defendants *knowingly made and knowingly permitted* the making and publishing of false official reports, was not sustained by the proofs.

The conclusion of the State Supreme Court on this controlling and decisive issue of fact, and its finding that the charge of knowingly making and knowingly participating in the false official reports complained of is without support in the evidence, is, in itself and without reference to the merits of other issues and contentions, a complete foundation and justification of the judgments of reversal. If this finding is correct it disposes of the present writs of error. Refinements and captious criticisms of inaccuracies of expressions found in the opinions of the state court are all pointless, unless it be demonstrated that the basic finding of fact which controls the judgment is wrong. The record thus presents, at the threshold, the inquiry: Should this court review the finding of the lower court on that issue of fact?

IV.

On error to a state court of last resort this court regards the findings of fact of the state court as binding upon it. This court, therefore, refuses to review issues of fact determined by the State Court; and whatever was a question of fact in the State Court is a question of fact on a writ of error from this Court to the State Court.

The rule stated in the head-note is settled by numerous well considered judgments. Since it has long been regarded as elementary, we cite only a few of the more recent cases. (*Dodger v. Richards*, 151 U. S. 628; *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 1 c. 97, 98; *Rankin v. Funch*, 218 U. S. 27, 1 c. 32; *Kerfoot v. Farmers & Merchants*, 218 U. S. 281, 1 c. 288; *Meitreich v. Luncheon*, 232 U. S. 236, 1 c. 243.)

In *Dodger v. Richards*, 151 U. S. 628, 665, it was said by Mr. Justice GRAY:

"The principal ground on which plaintiffs in error seek to reverse the judgment of the Supreme Court of California is that its decision, in matter of fact, was erroneous, and contrary to the weight of evidence in the case. But to review the decision of the state court upon the question of fact is not within the jurisdiction of this court."

In *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 97, Mr. Justice DAY expressed the limitations of the scope of inquiry by this court in the review of the judgments of the highest courts of the state, as follows:

"The jurisdiction of this court to review the proceedings of the state courts, as we have had frequent occasion to declare, is not that of a general reviewing court in error, but is limited to the specific instances of denials of federal rights, whether those pertaining to the constitutionality of federal or state statutes, or to certain rights, immunities and privileges of federal origin, specially set up in the state court, denied by the rulings and judgment of that court. U. S. Rev. St. §709, U. S. Comp. Stat. 1901, p. 575. Nor does this court sit to review the find-

ing of facts made in the state court, but accepts the findings of the court of the state upon matters of fact as conclusive, and is confined to a review of questions of federal law, within the jurisdiction conferred upon this court. *Quinby v. Boyd*, 128 U. S. 489; *Egan v. Hart*, 165 U. S. 188; *Dorner v. Richards*, 151 U. S. 658; *Thayer v. Spratt*, 189 U. S. 346. We shall not, therefore, undertake to follow counsel in the consideration of all the questions argued, but shall limit our review to questions of a federal nature which we deem to be properly made in this record, and essential to the decision of the case."

In *Rankin v. Emigh*, 218 U. S. 27, 32, the present Mr. CHIEF JUSTICE said:

"It is true that there are other assignments of alleged error, but we put them at once out of view, as they in substance but assert that the court below erred in affirming the judgment of the trial court because certain of the facts found were not sustained by the evidence—contentions which are not open to inquiry, as it is elementary that, on error to a state court of last resort in a case of this character, the findings of fact of the state court are binding on us."

Keweenaw v. Farmers & M. Bank, 218 U. S. 281, involved the validity of title to real estate conveyed to a national bank in violation of a statutory regulation. One contention in this court was that the title failed for want of acceptance by the bank of the conveyance. In holding that this court was concluded on the issue of fact by the finding of the state court, Mr. Justice HUGHES said:

"The Supreme Court of Missouri held upon the evidence that it was accepted, and this court, on a question of that character, does not review the findings of fact which have been made in the state court. *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86; *Egan v. Hart*, 165 U. S. 188; *Clippen Min. Co. v. Eli Min. & Land Co.*, 194 U. S. 220."

In *Meidrich v. Laenstein*, 232 U. S. 236, 1 c. 243, Mr. Justice DAY said:

"This court has repeatedly held that in cases coming to it from the Supreme Court of a state, it accepts as binding the findings upon issues of fact duly made in that court."

It is, of course, conceded that cases in which the finding is not strictly one of fact, but is, in itself, a legal conclusion on the federal right claimed, cases where there is a complete failure of evidence to support a conclusion announced upon a federal question, and cases where the facts on which the application of the federal right depends have not been determined, do not come within the purview of the rule just stated. In cases of these excepted classes it is the conceded duty of this court "to examine the evidence in order to determine what facts might reasonably be found therefrom and which would furnish a basis for the asserted federal rights." (*Carlson v. Washington*, 234 U. S. 103, 1 c. 106; *Meidrich v. Laenstein*, 232 U. S. 236, and cases cited.)

It is submitted that the records under review come clearly within the general rule that the findings of fact of the state court are conclusive, and that the records exclude the application of any of the recognized exceptions to that rule. Throughout this litigation the plaintiffs in error have persistently denied the application of the federal statute. It was the defendants, only, who introduced into the litigation by their answers the claim that section 5239 U. S. Rev. Stat. fixed the rule of liability. The opinion of the state court, as already shown, discloses that plaintiffs in error sought to avoid the controlling force of the federal statute under the specious plea "that, while the national bank act expressly commanded the publication of the official report, it did not require the publication of a *true* report, and that therefore the publication of a *false* report did not violate any express mandate of the statute"—a point adjudicated adversely to the conten-

tion when the cases were previously before this court. When the assertion of a federal right is first made in an application for a rehearing, which is overruled without any opinion or finding, it is questioned whether there is a foundation for review in this court.

But laying aside the sufficiency of the foundation claim of federal right by plaintiffs in error, the facts found by the State Supreme Court are conclusive here for the following reasons: Here the applicability of the federal right asserted depends wholly on the presentation of sufficient competent proof to establish that the defendants knowingly made or knowingly participated in making and publishing the false official reports of which complaint is made. Guilty knowledge—*scienter*—is by the statute an essential element. So much is settled by the prior judgment of this court. That fact, on which recovery under the federal statute depends, has been found against plaintiffs in error. The state court found no sufficient evidence in the record to warrant or sustain a finding that defendants knowingly made or participated in such false reports. There was no denial by the state court that *knowingly* making false reports would be actionable under the federal statute. The finding was strictly one of fact. Upon the fact so found the federal statute gave immunity from personal liability to the directors. The statute was rightly applied to the facts, as found, according to the specific commands of the opinion and mandate of this court.

This, therefore, is not a case where the purported finding of fact is a decision of law upon the federal right asserted. The only process by which this court can make the application of the statute warrant a reversal and entry of judgment in favor of the plaintiffs, is to review and reverse the finding of the State Supreme Court on an issue strictly of fact. The case does not fall within any of the exceptions to the rule that the determination of such an issue by the state court is conclusive.

The records now before the court present no question of whether the correct rule of liability, under the federal statute, was applied in rulings at the trial and in the charge of the court. By stipulation the parties waived a jury and tried the cases to the court. In a case so tried the only inquiries in the State Supreme Court were, whether, upon the evidence, competent to be considered, the trial court rightly found the facts, and correctly applied the statutory rule for determining liability. Determination of the issue of pure facts, whether the evidence sufficiently maintained the charge that the defendants had *knowingly* made the false reports, was the one essential condition of entering a judgment either of affirmance or reversal. The law had been settled on the writ of error in this court, so that it only remained to apply it to the ultimate facts established by the proofs. It was a pure fact issue that was decided. This court is concluded by the finding of the state court that a *scienter* was not proved. Upon that ascertained fact the federal statute grants immunity to the defendants, and compels the affirmance of the judgment of the Nebraska Supreme Court.

There is, as it seems to us, a further consideration that ought to be controlling. The issue of fraud presented by the several petitions of plaintiffs in error, involving, under the statute, the element of *scienter*, cannot be resolved in favor of the parties holding the burden of proof, *as a question of law*. Mr. Thompson testified, circumstantially, to his confiding belief at all times in the soundness and stability of the bank, and to his full belief in the verity of the four or five reports attested by him in the course of the several years that he was a director; that he never attested a report without first making inquiry as to its correctness and receiving assurances from the officers of the bank who had information superior to his own, that it was correct, nor until after it had first been sworn to by the president or cashier; and that he had never at any time participated in the active management of the bank.

but had at all times implicit faith in both president and cashier to whom the directors had delegated the management. He never attested a report in disregard of any criticism, request or warning of the Comptroller, or any bank examiner, or other agent of the Comptroller. His justification, and his refutation of the charges made by plaintiffs, was full and complete. On such a record, what is the appropriate forum to determine the issue of *scienter*, assuming for argument's sake (what is not admitted to be true) that there may be some conflict in the evidence? It cannot be urged, in reason, upon this record, that the proofs are not sufficient to sustain a finding on the issue of *scienter* in favor of Mr. Thompson. The nature of that issue as one of *fact* cannot be changed. It remains to be determined as such, before the application of the statute can control the judgment, in favor of either plaintiffs or defendants. A reversal by this court would necessarily involve a review of the issue of pure fact, the drawing of inferences from the evidence variant from those drawn from the same evidence by the state court, and substituting for that of the state court its own conclusions of fact drawn from conflicting evidence sufficient to support a finding either way.

The rule of this court, in such a situation, seems to be that the finding of the state court on an issue that determines whether the federal right asserted is applicable, will not in any case be disturbed if there is sufficient evidence in the record to sustain it. (*German Savings & Loan Society v. Dormitzer*, 192 U. S. 125, 1 c. 128, 129).

In the case last cited, Mr. Justice HOLMES clearly distinguished between the cases where a review of evidence by this court involves an inquiry into the *preponderance* of the evidence, and those in which there is *an entire want of evidence* to sustain a finding on which the applicability of a federal right depends. In the opinion it is said:

"It very well may be that, if the Supreme Court of Washington had undertaken to deny the jurisdiction of the Kansas tribunal *without evidence impeaching it*, such an evasion of the constitution would not be upheld. It may be that in fact some circumstances were adverted to by that court which hardly warranted an inference. But it had before it the testimony of the husband, Tull, from which it appeared that before he made the contract for a part of the land in question, he had sold out his property and business in Kansas, and had gone in search of what he called a new location, and that when he bought this land he decided to locate there. The land, it will be remembered, is in Spokane, Washington. Tull was there when the contract was made, and there, therefore, was ground for the court to find that at that moment he changed his domicile to Spokane. * * * There was evidence warranting the finding, and that being so, we take the facts as they were found." (*German Savings & Loan Soc. v. Dormitzer*, 192 U. S. 125, 128.)

It is also settled that whatever was a question of fact in the *state court* is a question of fact on a writ of error from *this court* to the state court. (*Eastern Building & Loan Assn. v. Ebaugh*, 185 U. S. 114, l. c. 121, per Mr. Justice McKENNA; *Chicago & A. R. Co. v. Wiggins Ferry Co.*, 119 U. S. 615, l. c. 622, 623, per Mr. CHIEF JUSTICE WAITE.

The conclusion is unavoidable that the issue of *scienter*, on which the applicability of the asserted federal right depends, was an issue of fact in the state court, and that it remains such on the writ of error from this court. On the facts found by the State Supreme Court, the statute compelled the judgments of reversal, and they should, therefore, be affirmed.

Among the errors assigned in this court (Printed Record, Case No. 501, *Jones National Bank v. Yates*, pp. 100, 102) are the following:

"7. The court erred in finding and deciding that the evidence in the record is not sufficient to sustain appellee's

judgment against appellants and each of them, under sections 5211 and 5239 Revised Statutes United States.

"8. The court erred in finding and deciding that the evidence in the record is insufficient to charge appellants with having knowingly made and published false statements of the financial condition of the Capital National Bank, or with knowingly permitting the officers, agents or servants of said bank to make and publish such false statements, or with participating in or consenting thereto.

"18. The court erred in not deciding that the findings of fact of the trial court contain every element necessary to sustain appellee's judgment, under section 5239 Revised Statutes of the United States, *and as such are supported by the evidence.*"

The quoted assignments present naked issues of fact, recognized to have been determined, as such, by the State Supreme Court. Such assignments present no questions that are reviewable on the present writs of error. While other assignments seek to introduce federal questions, and to complicate the issue, it seems obvious that the question of fact is decisive and controlling. The applicability of the statute, and its operation to make proof of a *scienter* an essential precedent condition of recovery, having been previously determined, it was unavoidable that a finding on whether the proofs sustained that issue must control the final judgment. Having been purely an issue of fact in the state court, it remains an issue of fact here, and as such is not subject to review.

V.

The petitions of plaintiffs tendered no issue upon any written reports other than those set forth in Exhibits A and B of December 28, 1886, and December 9, 1892, the latter of which was not participated in by Mr. Thompson.

We have shown, in Chapter III. *ante*, that the judgments of the State Supreme Court are not rested on either

one of the suggestions found in the opinion of HAMER, J., (1) that the petitions are insufficient, or, (2) that the only specific charges of false statements relate to the reports of December 9, 1862, and December 28, 1886. Upon these points there was not a concurrence of a majority of the court. The only ground for the judgments in which LETTON, J., concurred (and his concurrence was necessary to the rendition of judgments), was, that the evidence was insufficient to satisfy the rule of liability as determined by the authoritative judgment of the United States Supreme Court.

The points suggested, while not available to plaintiffs in error, were meritorious; and if judgments had gone upon those considerations they should not, for that reason, have been subject to reversal on the present writs of error. In Nebraska the Supreme Court retains the power, upon a second appeal, to reconsider the rule by which it formerly entered a judgment of reversal. (*Hastings v. Fortworthy*, 45 Neb. 676; *Eccles v. Walker*, 75 Neb. 722-727.) By appropriate objections to the competency of all reports offered, except those set forth in the petitions, defendants saved the points, and presented them upon the second appeal.

The Nebraska Supreme Court, very early in its existence, announced the rule that, in an action for false representations, it is necessary to set forth in the petition the precise representations which constitute the fraud, and that a mere averment that false and fraudulent representations were made was insufficient. That rule of pleading has since been consistently adhered to in a long line of well considered opinions, announced at frequent intervals. (*Arnold v. Baker*, 6 Neb. 135; *Aultman v. Steinan*, 8 Neb. 113; *Clark v. Dayton*, 6 Neb. 201; *Tepool v. Saunders County Natl. Bank*, 24 Neb. 817; *Staley v. Hausel*, 35 Neb. 164; *Crosby v. Ritchey*, 47 Neb. 924; *Kansas & C. P. R. Co. v. Fitzgerald*, 33 Neb. 137;

Thomas v. Thomas, 33 Neb. 373; *First Nat. Bank v. Grosshans*, 61 Neb. 579.)

The rule is not peculiar to Nebraska, but is of general acceptance. (*Parker v. Armstrong*, 55 Mich. 176; *Franklin Ins. Co. v. Jenkins*, 3 Wend. 130, 135; *Railroad Co. v. Douglas County*, 18 Kans. 178, and cases cited.)

The same principle is applied in other actions of tort, as well as in cases of deceit. When damages are claimed from the publication of defamatory words, the precise words of the publication must be set forth. Complaints which merely state the *import* of the words of the publication are defective in substance. The words published are the final test of their own import, and their omission from the complaint is fatal. (See 13 Enc. Pl. & Pr. 47.)

An allegation that a tabulation of figures embodying the several items of resources and liabilities, which reached plaintiffs, was exaggerated, without specifying a single item, cannot be said to embody either the terms or substance of a false representation. It is the statement of a mere naked conclusion, and not of any fact, and tenders no issue in an action of deceit. On principle and authority this proposition seems to be clearly established. Had the point that the evidence was insufficient been ruled against Mr. Thompson, the State Supreme Court could not justly have refused to rule on the point of pleading. And, since the later statement was not attested by Mr. Thompson, and the limitation had long since run on the statement of December 28, 1886, the point, if favorably ruled, would have determined the judgment in his favor.

We have stated the point thus briefly, because, in our opinion, the contention of plaintiff is not raised on the record, and cannot control the judgments upon the present review. In any event, the point is meritorious. At the same time, the rule of pleading in question, it is submitted, is a matter of local procedure, on which the decision of the State Court would be final.

VI.

Proof of a scienter is indispensable to maintenance of the present suits.

A national bank director is not liable in an action of tort for the wrongful acts of his fellow directors, either by the common law or by Sec. 5239 U. S. Rev. Stat.

Directors of national banks are not charged, by law, with knowledge of what the books and papers of the bank show, and are not obliged to act on the presumption of the rascality of the officers and agents of the bank.

The power to conduct the banking business may, under the statute, be delegated by the directors to administrative officers and agents. The director's obligation of administrative duties assumed by his oath, is so qualified by the words "so far as the duty devolves on him," as to harmonize with the express power to delegate administrative duties.

Thomas v. Taylor, 224 U. S. 73, affirms the rule of liability previously announced in the present suits; and, where it differs in facts from these cases, has no bearing on the separate case of defendant **David E. Thompson**.

A short review of the governing rule of liability, and of the contentions of plaintiffs in error, will make it plain that the evidence against Mr. Thompson is fatally deficient. The considerations which we present below will also demonstrate that the contention that *Thomas v. Taylor*, 224 U. S. 73, is a departure, in substance, or a modification of *Yates v. Jones National Bank*, is utterly destitute of merit. The present suits are for deceit, and the burden is on plaintiffs to prove the particular falsehoods against the director charged with liability. These are not actions for mere neglect, nor for misfeasance, nor for mismanagement of the bank. It is conceded that actions of the latter classes could not be maintained by plaintiffs. Consideration is here limited to proofs showing that the plaintiffs were deceived by acts of the defendants. No

supposed inattention or general neglect of duty, by which the bank or all of its creditors may have suffered a common misfortune, goes to the issue. Mr. Thompson is not called on to try immaterial collateral issues. The wrongs here charged are personal to plaintiffs and are not shared in common, by the association and all of its creditors. We are to inquire whether Mr. Thompson *knowingly made, or knowingly permitted* false official reports to be made, within the rule of the federal statute. This involves, at the outset, a consideration of the terms employed by the statute which creates and defines the liability.

According to the Century Dictionary, the adverb *knowingly* means: "In a knowing manner; intentionally; designedly; as, he would not *knowingly* offend." The applicable definitions of the corresponding participial adjective *knowing*, according to the same authority are: "Conscious; intentional." The illustrative example of this use of the term which follows the quoted definition is: "He that remains in the grace of God sins not by any deliberate, consultive, *knowing* act. *Jer. Taylor, Works* (ed. 1835) 1, 770."

The present Mr. CHIEF JUSTICE in condemning and exploding the doctrine that a director who merely attested an untrue statement is civilly liable "because *he* did so at his risk, since it was his duty to know or *ascertain* from acting," said:

"That this imposed a higher standard of conduct than was required by the statute is obvious, but is clearly also established by previous decisions of this court, pointing out that where, by law, a responsibility is made to arise from the violation of a statute *knowingly*, proof of something more than negligence is required; that is, that the violation must in effect be *intentional*." (*Yates v. Jones National Bank*, 206 U. S. 179, 180.)

The precise and technical accuracy of the quoted exposition of the significance of the term *knowingly* in section

5239 U. S. Rev. Stat., is proved by the accepted definitions, and by the references, in the opinion, to the previous decisions of this court. It contains no inaccuracies to be ironed out or refined away. On the previous hearing the sense and controlling force of the statute were elaborately presented by briefs, and were the sole points presented in the separate brief of Mr. Thompson. A refining process to destroy the definition of the rule of liability then announced, and to nullify judgments rendered in conformity thereto, and in obedience to the mandates of this court, should not be indulged upon the present hearing. The law of the case, as settled in the previous well considered and unanimous opinion, must control the disposition of the cases upon a second review.

The proofs show that Mr. Thompson's intentions and efforts were, always, to render *true* reports, and that he was at no time involved in guilty participation in any *false* report. Like the man who "remains in the grace of God," he "sinned not by any *knowing* act." On this state of the proofs he cannot be held to civil liability under the opinion previously delivered by this court in these same cases.

In *McDonald v. Williams*, 174 U. S. 397, which arose out of the same bank failure here involved, and is cited in the previous opinion of this court to sustain the construction there placed on Sec. 5239 Rev. Stat., the court said:

"The *permitting* to be withdrawn cannot be found upon the simple receipt of a dividend under the facts stated above. One is not usually said to *permit* an act which he is wholly ignorant of, nor would he be said to *consent* to an act of the commission of which he had no *knowledge*."

McDonald's Case, quoted above, was based on section 5204 U. S. Rev. Stat. forbidding withdrawal, in dividends or otherwise, of any part of the capital of a national bank. The word "knowingly" was not in the section, but the

construction held was based on the presence of the word "permit."

In *Potter v. United States*, 155 U. S. 438, also cited approvingly in the previous opinion in the present cases, upon the meaning of the word "knowingly," the court said:

"In *Felton v. United States*, 96 U. S. 699, 702, it was said: Doing or omitting to do a thing *knowingly* and *wilfully*, implies not only a knowledge of the thing, but a determination with a bad intent to do it or to omit doing it. The word 'wilfully,' says Chief Justice Shaw, 'in the ordinary sense in which it is used in a statute, means not merely 'voluntarily,' but with a bad purpose.' *Com. v. Kneeland*, 20 Pick. 220. 'It is frequently understood,' says Bishop, 'as signifying an evil intent without justifiable excuse.' 1 Bishop, Crim. Law, Sec. 428."

In *Utley v. Hill*, 155 Mo. 232, also cited approvingly in the previous opinion of this court in these cases, which involved the civil liabilities of a state bank of Missouri, the court said:

"The word *knowledge* here employed must be taken in its common acceptation; that is, in the plain or ordinary meaning and usual sense of the word. * * * It ought to be so construed that no man who is innocent can be punished or endangered * * *. So treated, we may properly look to the source to which men generally apply for the meaning of the word "knowledge." Webst. Dict. defines *knowledge*: '(1) The certain perception of truth; belief which amounts to, or results in, moral certainty; indubitable apprehension.' '(5) Information, intelligence; as, to have knowledge of a fact.' The *knowledge* which the law requires that a *director* shall have had, means a *guilty knowledge*, not an innocent, *bona fide* ignorance, arising from neglect to keep posted or to inquire. It must be construed to have been intended as a sword with which to punish the guilty, and a shield to protect the innocent. *If this had not been the intention the liability would have been made absolute and unqualified, instead of dependent upon knowledge.*"

Mason v. Moore, 73 Ohio State 275, cited incidentally in the previous opinion of this court in the present cases, holds upon the authority of *Briggs v. Spaulding*, that directors of a national bank are not charged, as a matter of law, with knowledge of its affairs, or what its books and papers show; and that such knowledge cannot be imputed to the directors, but must be proved like other essential facts.

Briggs v. Spaulding, 141 U. S. 132-174, cited incidentally in the previous opinion of this court in these cases, was a case in which this court considered the individual liability of national bank directors for neglect of duty, where recovery was sought in behalf of the corporation. In the opinion by Mr. Chief Justice FULLER it was said:

"Certainly it cannot be laid down as a rule that there is an invariable presumption of rascality as to one's agents in business transactions, and that the degree of watchfulness must be proportioned to that presumption.

"I know of no law," said *Vice-Chancellor McCoin*, in *Scott v. Depeyster*, 1 Edw. Ch. 541, 6 L. ed. 239, "which requires the president or directors of any moneyed institution to adopt a system of espionage in relation to their secretary or cashier or any subordinate agent, or to set a watch upon all their actions. While engaged in the performance of the general duties of their station, they must be supposed to act honestly until the contrary appears; and the law does not require their employers to entertain jealousies and suspicions without some apparent reason. Should any circumstance transpire to awaken a just suspicion of their want of integrity, and it be suffered to pass unheeded, a different rule would prevail if a loss ensued; but, without some fault on the part of the directors, amounting either to negligence or fraud, they cannot be liable."

"Nor is knowledge of what the books and papers would have shown to be imputed. In *Wakeman v. Dalley*, 51 N. Y. 32, Judge EARL observed in relation to Dalley, sought to be charged for false representations in the circular of a company of which he was one of the directors:

He was simply a director, and as such attended some of the meetings of the board of directors. As he was a director, must we impute to him, for the purpose of charging him with fraud, a knowledge of all the affairs of the company? If the law requires this, then the position of a director in any large corporation, like a railroad, or banking, or insurance company, is one of constant peril. The affairs of such a company are generally, of necessity, largely intrusted to managing officers. The directors generally cannot know, and have not the ability or knowledge requisite to learn by their own efforts, the true condition of the affairs of the company. They select agents in whom they have confidence, and largely trust to them. They publish their statements and reports, relying upon the figures and facts furnished by such agents; and if the directors, when actually cognizant of no fraud, are to be made liable in an action of fraud for any error or misstatement in such statements and reports, then we have a rule by which every director is made liable for any fraud that may be committed upon the company in the abstraction of its assets and diminution of its capital by any of its agents, and he becomes substantially an insurer of their fidelity. It has not been generally understood that such a responsibility rested upon the directors of corporations, and I know of no principle of law or rule of public policy which requires that it should.

"And so Sir George Jessel, in *Hallmark's Case*, L. R. 9 Ch. Div. 332: 'It is contended that Hallmark, being a director, must be taken to have known the contents of all the books and documents of the company, and so to have known that his name was on the register of shares for fifty shares. But he swears that in fact he did not know that any shares had been allotted to him. Is knowledge to be imputed to him under any rule of law? As a matter of fact, no one can suppose that a director of a company knows everything which is entered in the books, and I see no reason why knowledge should be imputed to him which he does not possess in fact. Why should it be his duty to look into the list of shareholders? I know no case, except *Ex parte Broten*, which shows that it is the duty of a director to look at the entries in any of the

books; and it would be extending the doctrine of constructive notice far beyond that or any other case to impute to this director the knowledge which it is sought to impute to him in this case.' "

Briggs v. Spaulding also holds that corporate directors, or trustees, are not liable for the wrongful acts of their fellow directors, or co-trustees.

It was upon a consideration of the foregoing authorities that this court determined the use of the term *knowingly*, in section 5239 U. S. Rev. Stat., makes guilty knowledge and, in effect, an *intentional* violation of the statute, an indispensable prerequisite of the directors' liability. But references to the same effect may be greatly extended.

An Ohio statute made it an offense for the owner of a house to *knowingly permit* (the identical terms of section 5239) it to be used for an unlawful purpose. It was held that *knowingly permitting* such use was not shown by evidence that a lessor, having knowledge of the illegal use of leased premises, failed to terminate the tenancy. *Crofton v. State*, 25 Ohio St. 249.

In *State v. Stafford*, 67 Me. 125, it was held that the terms *knowingly permit* imply permission or consent, as well as knowledge.

Rev. Stat. Sec. 328 (U. S. Comp. Stat. 1901, p. 2127) forfeits personal property owned by a person who has *knowingly permitted* or suffered his premises to be used for purposes of ingress or egress to or from an illicit distillery. It was held that it is a prerequisite to such forfeiture that the person should have *known* that the ingress or egress over his premises was to or from a distillery. *Gregory v. United States*, 10 Fed. Cas. 1195, 1198.

"In their ordinary acceptation the words 'unlawfully, wilfully and *knowingly*,' when applied to an act or thing done, import *knowledge* of the act or thing so done, as well as evil intent or bad purpose in doing such thing."

Per Mr. Justice HARLAN in *Rosen v. United States*, 161 U. S. 33, followed in *Price v. United States*, 165 U. S. 311.

In a statute making it a misdemeanor to *knowingly* vote, not being at the time a qualified elector, the term *knowingly* was held to mean *knowledge* of a state of facts which would disqualify the voter. *McGuire v. State*, 26 Tenn. (7 Humph.) 54, 55.

"We are of opinion that the words 'knowing it to be false' import a willful misrepresentation, with *actual knowledge* of its falsity, and not merely such constructive knowledge as can be imputed from the presumption that the officer signing the report knew the law and comprehended the precise import of the language used, when construed with reference to statutory provisions." *Pier v. Hanmore*, 86 N. Y. 102.

"To charge the officer with the severe penalty imposed for signing a false report, *knowing* it to be false, some fact or circumstance must be shown indicating that it was made in bad faith, wilfully, or for some fraudulent purpose, and not ignorantly or inadvertently; and this is a question of *fact* which must be passed upon before liability can be adjudged." *Pier v. Hanmore*, 86 N. Y. 103; followed in *Bonnell v. Gristcold*, 89 N. Y. 125, and applied to a defendant who, like Mr. Thompson, "relied on representations of the other parties having knowledge superior to his."

The proofs do not necessitate the application of the extreme rule held by most of the cases, in order to justify the judgments in favor of Mr. Thompson. There is an entire absence of proof that when Mr. Thompson attested any one of the four or five reports, which were the only ones with which he was connected in the course of the many years he served as director, he had knowledge of any fact or circumstance that would arouse his suspicion, or notify him that any report which he attested was false or fraudulent. It is settled that without knowledge of some

sort, at the time of the attestation, that the report was false, he cannot be held liable for *knowingly* attesting, or *knowingly permitting* the making and publication of a false report. "Their conduct is to be judged, not by the event, but by the circumstances under which they acted." Per Mr. Chief Justice FULLER, in *Briggs v. Spaulding*, 141 U. S. 155.

Without presuming to reargue the question that was settled on the previous review of these cases, we think it pertinent to recall some provisions of the National Banking Act, as an aid to the disposition of some minor contentions of plaintiffs in error.

Among other specific powers conferred by Sec. 5136 Rev. Stat. on national banks, are the following:

"*Fifth.* To elect or appoint directors, and by its board of directors to appoint a *president, vice-president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers, or any of them at pleasure, and appoint others to fill their places.*

"*Sixth.* To prescribe by its board of directors, by-laws, not inconsistent with law, regulating the manner in which its stock shall be transferred, its *general business conducted, and the privileges granted to it by law exercised and enjoyed.*

"*Seventh.* To exercise by its board of directors, or duly authorized officers or agents, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title."

While the section referred to makes action by the directors necessary to adoption of by-laws and selection of officers, it is too clear for disputation that it gives to the directors the alternative either of personal administration,

or of administration by officers and agents of their selection. Personal administration by the directors is not obligatory. The functions of administration were, in the case of the Capital National Bank, lawfully delegated to the president and the cashier. It was competent, under the statute, for the directors to delegate to those officers, as was done, full power of administration necessary "to carry on the business of banking." On this point there is not room for construction.

The National Banking Act did not require the director to assume, by his oath of office, the burden of personally administering the association. The burden assumed by the official oath of the director was so qualified as to permit of his delegating all of the administrative duties, as expressly authorized by the quoted provisions.

So much of Sec. 5147 Rev. Stat. prescribing the official oath, as is material to the point under consideration, is as follows:

"Sec. 5147. Each director, when appointed or elected, shall take an oath that he will, *so far as the duty devolves on him*, diligently and honestly administer the affairs of such association, and will not *knowingly violate or willingly permit to be violated*, any of the provisions of this title.
* * * *

The obligation of administration is limited and qualified, by the words "so far as the duty devolves on him," so as to harmonize with the express power to delegate the administration, conferred by Section 5136. When the director chooses to exercise the function of administration, he is, of course, held by the statute and by his oath to the standards of *diligence* and *honesty*. There are certain functions, like participation in by-laws and selection of officers, which he cannot delegate, and as to these he is held to the same standards. But delegation of the *general conduct of the business of banking* to the president and cashier, is consistent with both the grant of powers by Section

5136 and the oath of office prescribed by Section 5147. In so far as such administrative duties are thus lawfully delegated, the burden of administration assumed by the official oath has no application, since they do not then *devolve on him*, and, therefore, do not come within the terms of his oath. There seems here no room for construction. Saving a reasonable and fair interpretation of the words of the oath, this general suggestion is true to the statute and is unavoidable, except by a perversion of its terms or a judicial usurpation of legislative prerogatives. This theory of the statute, within certain limitations not well defined, was recognized by Mr. Chief Justice FULLER in *Briggs v. Spaulding*, 141 U. S. 132-174.

The maintenance of the judgment in favor of Mr. Thompson does not call for any re-examination or revision of the holding in *Briggs v. Spaulding*, since it was there held that the director is not charged, by law, with knowledge of what the books and papers of the bank would show, is not obliged to act on the "presumption of rascality" of the administrative officers and agents of the bank, and is not liable for the wrongful acts of his fellow directors, in which he did not participate. It is enough for the purposes of *Mr. Thompson's case* that these conclusions are necessarily drawn from the plain and unambiguous terms of the governing statute. It is obvious, upon these considerations, that the mere attestation of the report does not prove the director's knowledge of its falsity. Such knowledge, which is indispensable to the maintenance of these suits, cannot be *derived* from the director's *presumed* knowledge of the books and records, nor *imputed* to him, as a matter of law, either from such source, or from his holding the office of director. Affirmative proof of some sort that false statements were *knowingly* made by the individual director is essential to plaintiff's case.

Sec. 5239 U. S. Rev. Stat. defining the liabilities of national bank directors, is as follows:

"If the directors of any national banking association shall *knowingly violate*, or *knowingly permit* any of the officers, agents or servants of the association to violate any of the provisions of this title, all the rights, privileges and franchises of the association shall be thereby forfeited. *Such violation* shall, however, be determined and adjudged by a proper circuit, district, or territorial court of the United States, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved. *And in cases of such violation every director who participated in or assented to the same*, shall be held liable, in his personal and individual capacity, for all damages which the association, its shareholders, or any other person, shall have sustained in consequence of *such violation*."

The italics are employed by us, in quoting this statute, to show that in each provision there is a reference back to the terms *knowingly violate* or *knowingly permit* contained in the first sentence of the section. It is only in case of *such violation*, that is, one *knowingly* done or *knowingly permitted* by the director, that he is made liable in damages; and even then it is only the director *who participated in or assented to the same* who is made liable in his personal capacity for damages sustained in consequence of *such violation*.

This punishment is imposed only for personal delinquency. The statute requires proof of *participation* in, or *assent* to, a violation of the statute, *knowingly* committed, or *knowingly permitted*. Its terms definitely exclude the theory that an innocent director can be held for the wrongful acts of his fellow directors. The liability is as distinctly personal to the wrongdoer, as is the obligation of the director's oath to the individual who swears to it.

The general rule, that a director is not liable for the tort of a fellow director, which is in harmony with the statute

under consideration, and with the holding in *Briggs v. Spaulding*, 141 U. S. 132-174, was well stated and applied by the Nebraska Supreme Court in *Gerner v. Mosher*, 58 Neb. 144. In that case a verdict was directed in favor of Mr. Thompson for want of proof of participation in a report, which was the foundation of an action of deceit. In approving the direction of a verdict for want of proof of participation, the court said:

"The plaintiff seeks to avoid the effect of failure of proof in this respect by the argument that the four directors *not joining* in the reports were bound *as directors* to know the condition of the bank, and conclusively presumed, therefore, to know the falsity of the reports, and that *the reports being a corporate act*, are their act as well as that of those actively participating. * * * The corporation may be bound by the act of its constituted officers, but when it is sought to charge *officers individually* for *ultra vires* acts, or for *misconduct*, it is only those who *participate* therein who are liable, in the absence, of course, of conspiracy or indirect participation, which was not only unproved, but was affirmatively disproved. As to Thompson, Stuart, Phillips and Hamer, it follows that the judgment must be affirmed."

This quoted point in the opinion of Judge IRVINE was concurred in by all of the judges and commissioners, and is authoritative; although *on other points* NORVALL, J., delivered the ruling opinion. *Participation* was made the test of liability. And, with the addition of the element of *scienter*, this is the precise test employed in Sec. 5239 U. S. Rev. Stat.

To the same point HAMER, J., in his opinion in the instant cases said:

"Neither is he (a national bank director) liable for the frauds and wrongs of the officers of the bank, unless he has personal knowledge thereof, or participates in such fraudulent acts. If it were not so, there would be great difficulty in securing men to assume the position of nation-

al bank directors. The rule for which plaintiffs contend, if carried to its ultimate conclusion, would make the director of the national bank who has himself been imposed upon and deceived by its officers, and who has thereby suffered loss, liable to the depositors for the fraudulent acts of such officers." (Printed Record *Jones National Bank Case*, 501, p. 52; *Jones National Bank v. Yates*, 93 Neb. 127.)

In view of the complete exposition of the rule of liability in *Yates v. Jones National Bank*, 206 U. S. 158-181, the foregoing review of the statutes and decision may be superfluous. They are presented because of the claim urged by plaintiffs in error that the decision in *Thomas v. Taylor*, 224 U. S. 73, so far qualifies and modifies *Yates v. Jones National Bank*, as to permit a recovery against directors by imputing knowledge to them of the falsity of the report from the mere facts of attestation and official relationship. It is claimed that the same circumstances from which liability was adjudged in *Thomas v. Taylor* were shown in the present cases. Too much is claimed for the latter precedent, which has no bearing or significance in the case of Mr. Thompson, as made on the records under review.

It is to be noted, at the outset, that *Thomas v. Taylor* is a flat and express affirmance of the rule of liability declared in *Yates v. Jones National Bank*. To this effect Mr. Justice McKENNA in the opinion (224 U. S. 80, 81) said:

"All through the argument of plaintiffs in error runs the insistence that the common-law action of deceit does not lie against the directors of a national bank, and that the only measure of their responsibility is laid down in the national banking laws. This is admitted. It was conceded by the appellate division as having been established by *Yates v. Jones National Bank*, *supra*, and the question in the case comes to the simple one, whether the appellate division rightly decided that the findings in the case at bar satisfied the test of liability declared in the *Yates Case*.

"In that case a broad consideration of the national banking laws was given, and it was deduced from the ' that the report which Section 5211 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3498) required must contain a 'true' statement of the condition of the bank, and that 'the making and publishing of a false report is prohibited.' These, however, it was said, were implications, but that the liability of the directors was fixed by the express provisions of the laws, and its extent was measured 'by the promise not to knowingly violate, or willingly permit to be violated, any of the provisions of' the title relating to national banks.

"This test is the foundation of the action. The complaint charges plaintiffs in error with *actual* knowledge. The allegation is that when plaintiffs in error attested the report 'they knew the same was not correct, and was false, and said statement was thus attested by them with the intention of deceiving the public, and, among others, the plaintiff' (defendant in error). And the appellate division says: 'That the report was false, and *known* to the defendants to be false, they do not deny, nor do they attempt to explain their conduct.' This would seem like a finding of fact of *knowledge* of the falsity of the report on the parts of plaintiffs in error. Indeed, in distinguishing the case from the *Yates Case* the court did so on the ground that in that case 'there had been a recovery against directors without proof of *scienter*, which proof the statute requires,' and added: 'Such proof has been supplied in the present case.' "

The conclusiveness of the quoted observations is obvious. But the whole argument of plaintiffs in error in the present suits, ignoring the distinct adherence of the opinion to the doctrine held in *Yates v. Jones National Bank*, and the application of that doctrine to the record then under review, is rested upon the condemnation by the court of an argument of counsel which distorted and perverted the language of its previous opinion. Counsel argued, says the opinion, that the act requires "proof of something more than negli-

gence and recklessness, and that *nothing short of an intentional violation will suffice;*" and supported the argument by a reference to *Yates v. Jones National Bank*. In so far as this argument was based on the opinion cited, there was an obvious interpolation of the words "and recklessness," and an omission of the qualifying words "in effect." Counsel had taken liberties with the language employed by the court which amounted to a perversion, which the court took occasion to condemn, by recalling the precise words of the opinion, and pointing out the departure therefrom by counsel, as follows:

"The language there is 'that where by law a responsibility is made to arise from the violation of a statute knowingly, proof of something more than negligence is required,—that is, that the violation must in effect be intentional.' Not, therefore, that as a condition of liability there should be proof of something more than *recklessness*,—not that there should be an intentional violation,—but a violation 'in effect' intentional. There is 'in effect' an intentional violation of a statute when one deliberately refuses to examine that which it is his duty to examine. And such was the conduct of plaintiffs in error in this case. *They had notice* from the Comptroller of the Currency that \$194,000 of items counted as assets of the bank were doubtful and should be collected and *charged off*. This 'was a direct *warning* to them,' as the trial court said, 'by the bank examiner and Comptroller, that assets to nearly twice the amount of the capital stock were considered doubtful.' They, notwithstanding, represented the assets to be good. Such disregard of the direction of the officers appointed by the law to examine the affairs of the bank, is a violation of the law."

In the final analysis, approval of the judgment against the attesting directors was justified by the undisputed proof that the directors had previous *notice*, through a *warning* letter of the Comptroller, that items aggregating nearly twice the capital stock, were counted assets, which were doubtful and should be collected or charged off. It turned

out that many of these identical items were valueless, and liability was only adjudged to the extent that losses were sustained *on items to which the attention of the attesting directors had been specifically challenged*. In other words, it was based on knowledge and notice received, in writing, previous to attestation of the false reports on which liability was predicated. The directors offered no explanation and no justification for the attestation, made after obtaining *knowledge* of the large deficit in admissible assets. The rule of *Yates v. Jones National Bank* was applied without change or modification.

The authorities heretofore cited demonstrate that there is no tenable ground for modifying or altering the rule previously expounded and applied to these cases. To knowingly violate the law, implies *knowledge* of facts which would render the act one that is forbidden by law. To knowingly participate in a false and fraudulent report implies *knowledge* of falsifications and frauds. To knowingly permit the officers to make such report implies both *knowledge and assent* to the falsifications and frauds. One cannot *permit* an unlawful act *knowingly* without any notice or knowledge of facts which indicate it to be unlawful. These conclusions have been repeatedly announced by this court in the opinions to which reference has been made.

As we have previously pointed out, Mr. Thompson did not attest or participate in any report subsequent to July 9, 1891. The earliest letter from the Comptroller in this record is of date September 8, 1891. No act of Mr. Thompson is challenged on the ground that he failed to give heed to any information conveyed to him by the Comptroller. So the particular facts that controlled *Thomas v. Taylor* have no analogy in the case of Mr. Thompson, and that particular aspect of the decision has no bearing, direct or remote, upon any issue raised on the present record affecting him.

Under a separate chapter of this brief we present a review of the evidence, as far as it is contained in the

printed record, to show that proof of a scienter—that he *knowingly* made, or *knowingly* permitted making and publication of false reports—is wholly wanting, and that the evidence is not sufficient to warrant or sustain a judgment against Mr. Thompson within the rule of liability defined by statute.

VII.

The interpretation and application to a motion for a rehearing of a provision in the state constitution making concurrence of a majority of the judges of the Supreme Court necessary to any decision, and the interpretation and application to the Chief Justice of the State Supreme Court of a disqualifying state statute forbidding any judge to sit in a case in which he is interested or has been counseled, involve matters of mere local law, not cognizable by this court on writs of error, and present no questions of lack of due process.

The equal division of the judges of an appellate court on a motion for a rehearing leaves its previous judgment in force.

An issue of whether a judgment has the concurrence of a majority of the judges of the court which rendered it, must be resolved by a consideration of the number who concurred therein at the time of its rendition, and not by the equal division of the judges upon a motion for a rehearing.

If, upon any theory, the questions stated are open to review, the conclusions reached by the State Court will be found to be correct and in harmony with the rules and decisions of this court.

Plaintiffs in error question the validity of the judgments of reversal on the ground that there was not a concurrence therein of a majority of the judges, by assignment 23 (*Jones National Bank v. Yates*, No. 501), as follows:

"23. The court erred in reversing appellant's judgment and dismissing the case because the judgment is not concurred in and supported by a majority of the duly elected and qualified judges of this court as provided in Article VI, Section 2, of the *Constitution of the State of Nebraska*, whereby appellee has been deprived of his property without due process of law, and denied the equal protection of the laws, all of which is prohibited by and in conflict with the 14th amendment to the Constitution of the United States.

"This court still had jurisdiction of the case at the time it came on for final determination on appellee's motion for a rehearing, and when the final order was made herein there was not a majority of the court who were in favor of or concurred in the reversal and dismissal of this case."

By the section of the state constitution referred to in the quoted assignment, the Supreme Court of Nebraska is constituted of seven judges, the concurrence of four of whom is necessary to pronounce a decision. The record shows entry of judgments of reversal January 31, 1913. The official report shows (93 Neb. 121) that REESE, Chief Justice, did not sit, and that of the six judges who participated, *four*, a constitutional quorum, concurred, and *two* dissented. The judgment so entered still stands, and it appears to have had the concurrence of the constitutional number of judges when entered. So much even the quoted assignment seems not to question.

The record shows a subsequent order, entered May 17, 1913, for an oral argument on a motion for a rehearing. The argument having been had, there was an entry made on the Journal January 7, 1914, as follows:

"This cause coming on to be heard upon the motion of the appellee for a rehearing herein, was argued by counsel and submitted to the court, and a vote of the judges was had and taken upon a motion to allow a rehearing, and Judges Barnes, Hamer and Rose, voted against allowing a rehearing, and Judges, Sedgwick, Letton and Fawcett voted to allow a rehearing, and thereupon Chief Justice Reese voted in favor of allowing a rehearing and declared

said motion to be carried; and upon due consideration whereof, the court doth find probable error in the judgment of the court heretofore entered herein. It is therefore ordered and adjudged that said motion of appellee for a rehearing be and the same hereby is allowed, and a rehearing herein ordered.

"Thereupon the following protest was filed: 'Hamer, Rose and Barnes, JJ., dissent from the order granting a rehearing herein, and protest against the entry thereof on the journal of this court, for the reason that it is void for want of a qualified constitutional majority to grant such a rehearing, the Chief Justice having been consulted by the plaintiff, and having so announced when the case was on for hearing. *Shumway v. State*, 82 Neb. 163.'" (Printed Record, *Jones National Bank Case*, No. 501, pp. 65, 66.)

The protest, in the form quoted, is a part of the journal entry of the order granting a rehearing. For the reason stated therein, the Chief Justice had, on every occasion when the causes were called, announced his disqualification, had withdrawn from the bench while they were under consideration, and had left the decision entirely to his qualified associates. A like course had been pursued by the Chief Justice upon the oral argument of the motion for a rehearing, with the acquiescence of his associates and of all the parties to the suits.

By the protest entered on the journal three of the judges were impelled to *make public* the fact that the Chief Justice, notwithstanding his self-announced disqualification, had, in the secret councils of the court, cast the deciding vote, when he found his associates equally divided upon the motion for a rehearing. It later became known that the Chief Justice, in the same manner, had caused the entry of the previous order for an oral argument on the motion for a rehearing, although he declined to sit when the court heard the oral argument. It was conceded that the Chief Justice intended no wrong, but, nevertheless, his grievous error was a shocking breach of

propriety, and his participation rendered the order for a rehearing void, as stated in the quoted protest. The disqualification was declared by a state statute, and is therefore a mere local rule touching upon the interpretation of the highest state court is supreme and final.

Upon the Chief Justice's participation being thus called to the notice of the parties, Mr. Thompson (as did the other defendants) moved (1) to vacate the order of January 7, 1914, for a rehearing; (2) to vacate the order of May 17, 1913, for an oral argument; and (3) to correct the journal entry of its proceedings so as to show an equal division of the qualified judges on the motion for a rehearing, and to order that such equal division is a vote of adherence to previous judgment of reversal. The motion recited the particulars in which the proceedings were challenged, and assigned the disqualification of the Chief Justice, his announcement thereof, and the acquiescence of his associates and all of the parties to the suits in his retirement, and was supported by circumstantial testimony, by affidavit, of three witnesses. (Printed Record, *Jones National Bank Case*, No. 501, pp. 66-75.)

After these motions were noticed for hearing the Chief Justice filed a written statement (Printed Record, *Jones National Bank Case*, No. 501, pp. 75-77), in which, among other things, he said:

"When the case was called I did say that I had been consulted by one of the plaintiffs and felt that I ought not to take any part in the decision of the case, and on each occasion when the case came up in any form, if in court, *I withdrew*, if in the consultation room, *I kept silent*. I was acting in entire good faith and believed I should take no part in the decision. * * *

"It is true that I said from the bench that I had been consulted in the case and should not take any part in the hearing. It is true that I invariably left the court room on each occasion when the case was up for argument, and never took any part in the discussion of the merits of the case."

Upon the direct issue thus presented the State Supreme Court, by a vote of 5 to 1 (the Chief Justice not sitting), held that the Chief Justice was by a state law disqualified to sit, and that his participation rendered the order for a rehearing void. It further held that an equal division of the judges upon a motion for a rehearing was an adherence to the former judgments of reversal, and that to vacate its own previous judgment, or to grant a rehearing to review its own judgment, requires the concurrence of a constitutional quorum of the court. The order in which the Chief Justice participated, being held void, was vacated and an order (concurred in by five judges) was entered denying the motion for a rehearing and adhering to the previous judgments of reversal. (Printed Record, *Jones National Bank Case*, No. 501, pp. 92-95, 97.)

The state court's decision on the sensitive issues of propriety, and the invalidity of the exercise by a disqualified judge of judicial functions, was sound law and ethics; it lifted all odium from the court; it silenced all murmurs and complaints of partiality and bias, incident to participation of an interested judge who had once withdrawn because of a self-professed and self-proclaimed interest; it kept the stream of justice pure and vindicated the letter and spirit of the disqualifying local statute. The motion to vacate was of grave import to the bench, the bar, the suitors for justice and the citizens of Nebraska, and it was highly creditable to the court that its decision on the issue of propriety was not influenced by the individual views of its members on the motion for a rehearing.

It is submitted, (1) that the issues of whether the Chief Justice was qualified and, incidentally, whether the order in which he participated was void, and whether, under the constitution of the state the allowance of a rehearing required the concurrence of four judges, are matters of local law of which this court cannot take cognizance; and (2) if those issues are open, an approval of the State Supreme Court's decision is imperiously demanded by the

highest considerations of justice, ethics, and sound public policy. The following doctrines are sound in principle and well sustained by authority:

1. Section 1174 Revised Statute Nebraska, 1913, provides that "A judge or justice is disqualified *from acting as such*, except by mutual consent of the parties, *in any case wherein he is a party or interested* * * * or where he has been attorney for either party in the action or proceeding, and such mutual consent *must* be in writing and made part of the record." Under this statute the want of judicial power because of a disqualifying interest does not depend upon an express challenge of a suitor. It is the official duty of the disqualified judge to become his own recusant, and to withdraw and wholly abdicate his judicial powers in the particular case. *Walters v. Wiley*, 1 Neb. Unoff. 235; *Oakley v. Aspinwall*, 3 N. Y. 547; *Horton v. Howard* (Mich.), 44 N. W. 1112; *People v. De La Guerra*, 24 Cal. 73.

2. The disqualification of the judge invalidates all acts involving an exercise of judicial discretion, including a ruling on a motion for a rehearing. *Cramp & S. v. Internat. C. M. Co.*, 228 U. S. 645; *Harrington v. Hayes Co.*, 81 Neb. 231; *Salm v. State*, 89 Ala. 56, 8 So. 67; *People v. De La Guerra*, 24 Cal. 73; *Shannon v. Smith*, 31 Mich. 453; *Gordon v. Connor*, 5 Idaho 673, 51 Pac. 749; *State v. Wofford*, 111 Mo. 526, 20 S. W. 236; *Frevert v. Swift*, 19 Nevada 363, 11 Pac. 273; *State v. Finder*, 12 So. Dak. 423, 81 N. W. 959; *State v. Burks*, 82 Tex. 584, 18 S. W. 622; *Perkins v. Haywood*, 124 Ind. 445, 24 N. E. 1033; *Lacy v. Barrett*, 75 Mo. 469; *Horton v. Howard* (Mich.), 44 N. W. 1112; *Oakley v. Aspinwall*, 3 N. Y. 547.

3. It is proper for the court, on motion, to vacate its own previous order where the same is void because made or participated in by a disqualified judge. *Case v. Hoffman* (Wis.), 74 N. W. 220; *Oakley v. Aspinwall*, 3 N.

Y 548; *Seward v. Tasker*, 143 N. Y. Supp. 257. Since this court has no concern in the mere forms of local procedure, *Wm. Cramp & Sons v. Internat. C. M. T. Co.*, 228 U. S. 643-654, must be regarded as a precedent sustaining the view that the order for a rehearing was rightly vacated.

4. The equal division of the judges of an appellate court on a motion for a rehearing to review its own previous judgment, leaves that judgment in force. *Carmichael v. Eberle*, 177 U. S. 63; *Shumway v. State*, 82 Neb. 152, 165. The application of this rule was forced on the State Supreme Court by the requirement of the State Constitution that the concurrence of four judges is necessary to a decision. The judgment of reversal had the concurrence of *four* judges, and to have permitted those final judgments to be vacated by *three* judges would have permitted a minority of the court to nullify judgments which, by the constitution, could only be rendered by a concurring majority of the whole court, and would have completely circumvented and nullified the constitutional provision.

Since rule 30 of this court specifically declares that no petition for a rehearing will be granted unless "a majority of the court so determines," it requires unusual hardihood to present here an assignment that due process is wanting in an order of the state court which merely decides that, after final judgment has once been entered upon an appeal, an equal division of the judges on a motion for a rehearing leaves the previous judgment in force. The frivolity and absurdity of the assignment are emphasized by the decision in *Carmichael v. Eberle*, ¹⁴⁷177 U. S. 63, that an equal division of the judges of the Supreme Court of the territory of New Mexico, upon a motion for a rehearing, was an adherence to its previous judgment entered by a concurring majority of the court, and left the previous judgment in force.

The rule, that an equal division on a motion for a rehearing leaves the previous judgment in force, was not promulgated by the State Supreme Court in the cases now under review. That rule was previously applied in a homicide case in which there was a capital sentence. *Shumway v. State*, 82 Neb. 152, 165. A short explanation will serve to make plain the significance of the *Shumway Case*. A judgment of affirmance was rendered July 17, 1908. (82 Neb. 152.) At that time the court was constituted of three judges only. A motion for a rehearing was made, on which the court heard oral argument, and which was not decided until January 23, 1909. (82 Neb. 165.) Meanwhile, at the November 3, 1908, election, the people adopted an amendment to the state constitution, whereby the number of judges of the Supreme Court was increased to seven, and four additional judges, appointed pursuant to that amendment, had qualified and were in the discharge of their judicial duties. Verification of these historical facts appears in the report of *State v. Dean*, 84 Neb. 344. When the motion for a rehearing was determined, the constitution, as amended, required concurrence of four judges to pronounce a decision. Judge ROSE, then a member of the court, had, previously as assistant attorney general, participated in the prevailing argument that had resulted in the affirmance of Shumway's capital sentence, and was, therefore, disqualified, by the statute previously mentioned, from acting as a judge in that particular case. He retired, as did the Chief Justice in the present cases, and left the determination of the motion for a rehearing to his six qualified associates. In that case, as in the present suits, the remaining six judges were equally divided on the motion for a rehearing. The report shows the ruling opinion on the motion by LETTON, J. (82 Neb. 166), to have been concurred in by BARNES, J., and ROOT, J. There was a dissenting opinion by FAWCETT, J. (82 Neb. 170), concurred in by REESE, C. J., and DEAN, J. An order was entered (82 Neb. 170) overruling the mo-

tion for a rehearing, and R. Mead Shumway, the convict, was executed, pursuant to the previous judgment of affirmance as the return of the death warrant issued by the clerk of the State Supreme Court will show.

The interpretation of the state constitution, which left in force the judgment affirming a capital sentence against Shumway, was applied, in precisely the same circumstances, so as to leave in force the previous judgments rendered in the instant cases. Only one judge questioned the soundness of the controlling precedent. The contention that the rule of due process, required by the 14th amendment, was violated by these proceedings, is not only frivolous, but is, in view of their strict harmony with the rules and decisions of this court, already cited, so far-fetched as to be grotesque. There is nothing of substance in the assignment of error under consideration, beyond an appeal to the court to review the interpretations of the State Supreme Court of the state constitution and the disqualifying state statute. It is elementary that decisions of the State Supreme Court involving mere constructions of local laws, are final, and not subject to review by this court. *Kiernan v. City of Portland*, 223 U. S. 151; *King v. West Virginia*, 216 U. S. 92; *Los Angeles Farming & Milling Co. v. Los Angeles*, 217 U. S. 217. The point is so elementary that we forbear to extend references. The claim that an equal division on the motion for a rehearing, deprived the judgments of reversal of all force and virtue, is utterly destitute of merit, and presents no federal question for review, upon any aspect of the present records.

VIII.

The issue of whether, upon the whole case, the evidence justified or required a finding in favor of the defendants, is not presented to this court by the printed record.

A large part of the evidence is not printed, and since this court only examines the printed record, it must presume, in favor of the finding of the State Supreme Court, that the evidence before the State Court, which is omitted from the printed record, justified and required a finding upon the whole case in favor of defendants.

Plaintiffs in error filed a written designation of the portions of the evidence contained in the bill of exceptions which they desired to have printed, in which they designated fragmentary portions, only, of the testimony. (Printed Record, Bill of Exceptions, pp. 765-772.) This designation, in numerous instances, directed the omission of all the testimony given by specified witness. Designations 1 to 3 are as follows:

"1. Bill of Ex. p. 1: title appearances and certificate of the clerk of the district court.

"2. Bill of Ex. pp. 13 to 14: stipulation.

"3. Bill of Ex. p. 15: first four lines at top of page."

The above are fairly representative and illustrative of 148 designations, which conclude with the designation of the bottom of page 1884 of the bill of exceptions. Designations 27 and 72, among others of like character, are as follows:

"27. Bill of Ex. p. 222: testimony of Hall Young, omit in printing.

"72. Bill of Ex. p. 581: testimony of H. T. Jones may be omitted in printing."

Portions of the many hundreds of pages omitted in the designations of plaintiffs in error have been brought into the printed record by some additional designations made

by defendants, but a very considerable portion of the great body of the testimony and documentary evidence is not contained in the printed record. This fact is obvious by a casual inspection of the printed record, so that the points here urged are raised on the face of the printed record.

In *Grand Trunk R. Co. v. Cummings*, 106 U. S. 701, it was said by Mr. Chief Justice WAITE:

"The evidence introduced on the part of the company is not in the bill of exceptions, * * * Under such circumstances it must be presumed, in the absence of anything to the contrary, that when the case was closed on both sides, there was enough in the testimony to make it proper to leave the issues to be settled by the jury."

In *United States v. Copper Queen C. M. Co.*, 185 U. S. 497, it was said in the opinion by Mr. Justice PECKHAM:

"When the court is asked to reverse a judgment entered upon a verdict of a jury, upon a writ of error, upon the ground that there is absolutely no evidence to sustain it, and the court should have directed a verdict, the bill of exceptions must embody a statement, or there must be a stipulation of counsel declaring that the bill contains all the evidence given upon the trial, so that the record shall affirmatively show that fact. *Russell v. Ely*, 2 Black, 575, 580. In the cited case the court, after remarking that the bill of exceptions did not purport to give all that a certain witness had testified to, said that, according to a well known rule, the court, under such a condition of the record, was bound to presume that there was that in the witness's testimony which justified the instruction."

There is here no stipulation by counsel that the printed record contains all the evidence. Plaintiffs in error took their own course in printing such parts of the evidence as they deemed important, and are only entitled to have considered such points of law as arise upon the printed record. That which is not printed is not available. It will be presumed that the obviously omitted parts of the testimony

contain evidence which justified or required the State Supreme Court to resolve the issue of fact, of whether the defendants had *knowingly* violated or *knowingly permitted* the violation of the statute requiring the making and publishing of reports, in favor of the defendants, and against the plaintiffs who held the burden of proof. It is submitted that this consideration, alone, should result in an affirmance of the judgments of the State Supreme Court.

IX.

The records do not present for review the point assigned by No. 9 of the assignment of errors, that the State Supreme Court erroneously decided the National Banking Act precludes the maintenance of an action for fraud and deceit based on voluntary acts of directors entirely without the scope of the act.

Rev. Stat. U. S. Sec. 709 (Judicial Code, Sec. 237) conditions the right of review in this court upon the circumstance that the decision of the state court was *against* the title, right, privilege or immunity claimed under the federal statute. Since the assignment in question asserts that the decision of the state court was in *favor* of the validity of the federal right, the statutory condition, on which jurisdiction of the court depends, does not exist, and the point asserted in the assignment of errors is not open to review. The cases to this effect are so numerous, and the doctrine so elementary and well settled, that we forbear to burden the court with references.

We assume that the very recent amendment of December 23, 1914, whereby there was added to section 237 of the Judicial Code, a provision authorizing this court, by *certiorari*, to review judgments of the highest courts of the states, although they may have been in *favor* of the federal right asserted, has no application to these pending suits, which are brought here upon writs of error. The

limitations upon the powers of this court to review such judgments upon writs of error are, apparently, not affected by the amendment of December 23, 1914, which merely confers discretionary power, by a special proceeding, to review judgments of the state courts, although they may have been in favor of the federal right asserted. These suits had long been pending and had been advanced and assigned for hearing before the amendment was enacted, and this circumstance, as well as the provision for a special proceeding by writ of *certiorari* for exercise of the enlarged powers conferred on this court, indicates that the amendment cannot affect or enlarge the court's appellate powers in the present suits, upon writs of error.

If the point, however, can be said to be open to review in these proceedings, it is obviously without merit. The defendants have never, at any time, during the long course of the controversies, claimed immunity under the federal statutes against liability for voluntary private acts; and the State Supreme Court in pronouncing the judgments under review did not so hold or decide. It is our understanding that all of the judges of that court were in accord on the proposition that the record contained no evidence whatever to sustain judgments against the defendants upon non-federal grounds. That is, there was no evidence that the defendants made any oral misrepresentations, as was specially found by the trial judge, and the averments to that effect were false. And there was no evidence that any of the present defendants ever participated in any statements or representations which came to the plaintiffs, other than to attest some reports to the Comptroller, which the National Baking Act required to be made and published. It was the entire absence of proof of liability on non-federal grounds that led to their elimination, and necessitated a determination of the federal question. To this effect the remarks of HAMER, J., addressed to the failure of proofs, in his opinion, were as follows:

"It is not shown that either Yates or Hamer ever had any communication or conversation with the plaintiffs, or any of them, in regard to the condition of the Capital National Bank. It is not shown that they or either of them had any knowledge that any published statement or cards containing any information as to the condition of the bank were ever sent to the plaintiffs, or any of them, by any officer or agent of the bank." (Printed Record, *Jones National Bank Case*, No. 501, p. 51; *Jones National Bank v. Yates*, 93 Neb. 125.)

Touching the evidence affecting Mr. Thompson, HAMER, J., said:

"That he was not informed in any way of the fact that published statements of the condition of the bank, were sent by any agent or officer of the bank to the plaintiffs, if any such were sent. * * * Defendant Thompson did not personally participate in any of the acts of which the plaintiffs complain, and they do not claim that he ever had any conversation with, or made any statement whatever to the plaintiffs, or any of them." (Printed Record, *Jones National Bank Case*, No. 501, p. 52; *Jones National Bank v. Yates*, 93 Neb. 126.)

The ground expressed by LETTON, J., for his concurrence in the judgments rendered was that under the decision of this court that "the measure of responsibility concerning the violation by directors of *express commands* of the national bank act is, in the nature of things, exclusively governed by the specific provisions on the subject contained in that act," he thought "a case had not been made." (Printed Record, p. 51; *Jones National Bank v. Yates*, 93 Neb. 131.) LETTON, J., proceeded on the assumption that no case had been proved on non-federal grounds.

The dissenting opinion by SEDGWICK, J., also proceeds upon the assumption that there was no proof of liability on non-federal grounds, and is confined to a discussion of the asserted claims of liability based on the reports made

to the Comptroller of the Currency. Because of these expressions and incidents we have understood that there was no division among the judges of the state court on the proposition that there was an entire failure of evidence to support the charges that defendants had either made or participated in any statements other than the reports to the Comptroller.

But if the opinion of HAMER, J., may be regarded as the ruling opinion on points other than the one in which LETTON, J., concurred, and if it may be derived therefrom that the State Supreme Court decided (as it did not in fact do) that the National Banking Act afforded immunity to directors from purely private and personal acts on which liability is predicated, this independent ground, that there was no evidence of liability on any charge of a non-federal character, definitely stated in the opinion, cuts away all support from the contention presented by the assignment of error under consideration.

If the court must examine the evidence to ascertain whether the State Supreme Court denied recovery on account of purely private and unofficial acts, on the ground that the National Banking Act afforded the directors immunity from liability for acts purely personal and unofficial, the record will prove that there was no evidence of such private acts on which liability could be predicated. Of course, the judgments should not be reversed for the purpose of permitting the assertion of a ground of liability that is not sustained by any evidence. We now present a sufficient review of the evidence to demonstrate that there was no proof that *Mr. Thompson* did any of the acts, charged, except to attest four or five official reports.

X.

There was a total failure of proofs on the issue that Mr. Thompson made or participated in unofficial or voluntary statements or representations of the resources and liabilities of the Capital National Bank. The record does not, therefore, present any ground of liability on non-federal grounds.

The charge contained in the petitions that Mr. Thompson made *oral* representations which deceived plaintiffs into making deposits was fiction and sham. This issue was disposed of in the trial court by the following special finding:

"In respect to the second and third requests of defendant, David E. Thompson, the court finds that the evidence does not show that said defendant made any oral statements or representations touching the pecuniary worth, standing or responsibility of said bank to the plaintiff, and further finds that plaintiff was not induced or influenced by any such oral statements of said defendant to deposit any funds in the Capital National Bank." (Printed Record No. 501, Jones National Bank Case, p. 27; No. 502, Bank of Staplehurst Case, p. 27.)

The above finding in favor of defendant was not excepted to by either plaintiff, and is conclusive of the issue in all appellate proceedings. The inquiry under this head is, therefore, limited to a consideration of whether there was evidence to show that Mr. Thompson made or participated in any *written* reports, or representations concerning the financial condition of the bank, other than to attest some four or five *official* reports, in the course of approximately nine years in which he was a director. This inquiry will determine whether he was shown by the proofs to have made or participated in the so-called voluntary and *unofficial* statements, advertisements and cards, separate and apart from the attestations required by the express terms of the National Banking Act.

Upon this issue the solitary witness in behalf of the *Jones National Bank* was its managing officer, Harry T. Jones. So far as he spoke to the subject of the alleged unofficial statements of the *Capital National Bank*, his substantive testimony is embraced in the following questions and answers:

(Printed Record, p. 375, 376.) Q. Now what was the custom of the *Capital National Bank* with reference to sending out statements of its condition to its customers?

Mr. Rose: Each of the defendants objects as incompetent and immaterial, and the witness not qualified to answer. Objection overruled. Each of the defendants excepts.

A. The *Jones National Bank* always received statements from the *Capital National Bank* immediately upon the publication of a statement:

Q. And in what form did those reach the bank, and through what medium?

Mr. Rose: Each of the defendants objects as incompetent, irrelevant and immaterial under the issues. Objection overruled. Each of the defendants excepts.

A. We received them *from the bank* in two forms. One is what I call on a printed slip. What I mean by that is, as the form would appear in the newspapers, that same form would be printed on slips of paper like the one I hold in my hand. The one I refer to on a business card was of the same date, but in a more condensed form, and usually the statement would bear the names of the directors of the bank—

Mr. Rose: Each of the defendants objects to this as not the best evidence. Objection overruled. Each of the defendants excepts.

A. —appeared a cut of the bank building, the name of the bank, the amount of capital stock, surplus, and names of the officers.

Q. Now the slips you refer to, in what form were they printed?

Mr. Rose: Each of the defendants objects as incompetent, irrelevant and immaterial, not the best evidence, no foundation laid, and not within the issues. Objection overruled. Each of the defendants excepts.

A. They were printed in the form, *exactly*, as published in the newspapers.

Q. And the cards, you say, were in a more condensed form?

A. Yes sir. By that I mean on the card under the head of cash would be included the actual cash, cash items and the amounts in their correspondent banks, subject to check on draft by the bank. And on the opposite side, under the head of deposits would appear all the deposits, including the individual deposits subject to check, the time certificates of deposit, the demand certificates of deposit and the country bank deposits.

Q. Now what did you do with those statements when they reached your bank, Mr. Jones?

A. I would always examine them and see the condition of the bank. That is a rule not only with the Capital National Bank, but with all banks with which we done business. It was the only method that the bank has of ascertaining the exact condition of the banks with which it is doing business. (Printed Record p. 377.)

Q. And did you preserve these cards and slips for any length of time?

A. Yes sir.

Q. Have you them now?

A. I have not.

(Printed Record p. 378): Q. How was the condition of the bank indicated? * * *

A. It showed the loans and discounts and the cash and cash items, and how the capital stock and deposits of the bank were invested.

Q. What did it show on the other side, which is labeled liabilities? (Objection overruled.)

A. It showed the amount of capital stock, the surplus, the individual profits and the amount of deposits. * * *

A. It always showed (capital stock) the sum of \$300,000. * * *

Q. It showed that it was not impaired?

(Printed Record, p. 379): Yes sir, every statement showed a surplus, and a certain amount of undivided profits.

At this point in the examination of Harry T. Jones he was asked concerning his having seen and examined specific official reports to the Comptroller in the newspapers. And then a suggestive form of examination was gone through concerning the unofficial delivery of like statements to him. His examination concerning the published official report, Exhibit X 979, was followed by the following questions and answers (pp. 379, 380):

Q. Did you see it in any other form?

Mr. Rose: Each of the defendants objects to that as incompetent, because the question itself is contradictory. It necessarily couldn't be this exhibit and be in any other form; or it couldn't be this exhibit. Objection overruled. Each of the defendants excepts.

A. I did.

Q. Did you see the statement of the bank for the same day that this purports to be, and giving the assets and liabilities as they are here, but in a different form?

Mr. Rose: Each of the defendants objects as incompetent, irrelevant and immaterial; no foundation laid. Objection overruled. Each defendants excepts.

A. I did. The condensed form which I refer to is the business card or statement.

Q. How did it compare as to showing the assets and liabilities with the published form?

Mr. Rose: Each of the defendants objects as no foundation laid; calling for a mere conclusion of the witness without furnishing any basis to use for comparing it and verifying it; and not within the issues. Objection overruled. Each of the defendants excepts.

A. As to the total amount of resources and liabilities they agreed; but, as I have said heretofore, in the card form it was more condensed. All the cash items were under the head of cash—that would include the amount

they had on deposit with their several correspondents, subject to check or draft—they treated that as cash.

The same process was then gone through with in an omnibus fashion (pp. 381, 382), as follows:

Q. Now with reference to these exhibits X. 977 to X. 988, except exhibit No. X. 981, which is a card, I will ask you if you received, or if you saw the statements of the bank for those same dates, but in different forms?

Mr. Rose: Each of the defendants objects as incompetent, irrelevant and immaterial; not the best evidence; not within the issues, and assuming a fact not proven. Objection overruled. Each of the defendants excepts.

A. I did. I saw them in two forms.

Q. What were they? (Objection overruled.)

A. In the newspapers and what I term the printed slip, which is an *identical copy*, using the same form as it appeared in the newspapers, and of the statement on what I term the business card.

Q. And how did the amount as shown on this business card, or the card that you received, *compare* with the amounts as shown by this slip, as you call it; and with the reports as they appeared in the paper? (Objection overruled.)

A. The total amount of resources and liabilities always agreed; had there been a disagreement it would have shown there was something wrong. (Last part of answer was stricken on motion.)

Jones then testified over like objections and exceptions (pp. 382, 383), as follows:

Q. Did the newspapers published at Lincoln, the Lincoln Journal and the Call, during the time the Capital National Bank was in existence and doing business, contain any cards or advertisements of the *Capital National Bank*?

A. They did.

Q. Did you see them in the newspapers as they came to you?

A. I saw many of the published advertisements in both the State Journal and the Lincoln Call.

Q. You read them in those papers?

A. I did. * * *

Q. Have you the papers in which you saw those notices as they came out?

A. No sir. I did not preserve a file of the papers.

* * * *

Q. Now the cards and slips that you referred to, came to you, I believe you said, through the mails?

A. Yes sir.

Q. In an envelope directed to the Jones National Bank, and from the Capital National Bank?

A. They did.

We have now quoted the entire showing of the Jones National Bank bearing on the issue of whether *Mr. Thompson ever made or participated in any voluntary or unofficial written statements, of any character, concerning the Capital National Bank.* The testimony does not in any manner, connect the name of *Mr. Thompson* with any such alleged statement. *Harry T. Jones* makes no pretense of having received them from *Mr. Thompson*, and mentions no fact from which it is inferable that *Mr. Thompson* had any knowledge of the incidents. He claims to have received cards and printed slips *identical with official reports* (which makes them out to be the *official reports*), from the *Capital National Bank*, and to have seen advertisements of the *Capital National Bank*; but presents no proofs that they were the acts of *Mr. Thompson*. The argument that this showing presents a non-federal ground to sustain a judgment against *Mr. Thompson*, is, to borrow one of the expressive figures of *Lincoln*, "as thin as soup made from the shadow of a pigeon, that had starved to death."

The case of the *Bank of Staplehurst* is likewise destitute of proof that *Mr. Thompson* made or participated in any *unofficial* statements of the *Capital National Bank*. *E. Jacobs* was the sole witness who spoke for the *Bank of Staplehurst* touching the alleged *unofficial* and *voluntary*

statements. His testimony to this point, as found in the printed record, is as follows:

(pp. 405, 406): Q. How many statements of its financial condition did the Capital National Bank publish each year?

A. Five.

Q. You may state whether or not you saw all of them while you were cashier of the Bank of Staplehurst, and doing business with the Capital National Bank?

A. I have seen them all as near as I remember.

Q. Now did you receive them in any other form?

A. I seen them in a condensed form in the shape of a business card.

Q. Where did you see those?

A. They were sent to the bank about as regular as the statement came out.

* * * *

(p. 407): Q. Now, Mr. Jacobs, these *card statements* that you have testified to and that you were not able to find, tell the court, in substance, what they contained, and especially with reference to the statements that were contained in the newspapers?

Mr. Rose: Each of the defendants objects as incompetent, irrelevant and immaterial; not the best evidence; no foundation laid; not within the issues; nor binding upon any one of the defendants. Objection overruled. Each of the defendants excepts.

A. They were in a more condensed form, in the shape of a business card, where the deposits were all in one—you might say it corresponded with the published reports, only it was more in a condensed form.

(p. 408): Q. And what else appeared on the card? (The same objection was overruled.)

A. The capital stock, the surplus, the undivided profits.

Q. And do you remember the capital stock as shown to be on those cards? (Same objection was overruled.)

A. The capital stock was \$300,000.

Q. And did those cards purport to state the financial condition of the bank at the particular date for which the

statements in the newspapers purported to give? (Same objection was overruled.)

A. Yes sir.

Q. Now were there any names on the cards? (Same objection was overruled.)

A. Yes sir.

Q. State what they were and how they appeared on the card? (Same objection was overruled.)

A. Mosher and Outcalt and Walsh, as officers; D. E. Thompson, Hamer and Yates, and several others as directors.

Q. Was Stuart's name on them?

A. Stuart's name was on there, too.

Q. And Phillips?

A. And Phillips. I can't remember all the names.

Q. Can you give us the form of the card, just about what it said, what it *purported* to state? (Similar objection was sustained.)

A. Well, it was in kind of business card form, the names on one side, and the statement of the bank on the other side.

On cross-examination (Printed Record p. 415) *E. Jacobs* testified he did not know Mr. Thompson personally and never conversed with him about any subject whatever.

Not one *voluntary* and *unofficial* bank statement was offered or read in evidence. Not one appears in the record. No secondary evidence of the contents thereof was given, unless it can be said that the argumentative statements of *Jones* and *Jacobs* that the footings on all card statements agreed with the footing of official statements, and that *Jones'* "printed slips" (the like of which was not mentioned by *Jacobs*) were in the identical form of the official statements, may be said to prove their contents by reference to the *official* statements. To argue that this proved their contents, is to concede that they were, in fact, the official statements, and governed by the rule of liability prescribed in the National Banking Act, as determined by this court on the previous writs of error in these identical suits. But let us pass this point.

What does the testimony of *Jones* and *Jacobs* show touching *Mr. Thompson's* participation in any unofficial report? What is there in the quoted testimony to prove that these so-called *unofficial* and voluntary statements were the acts of *Mr. Thompson*, on which liability in an action of tort may be adjudged against him? Absolutely nothing. Proof of this necessary foundation connecting *Mr. Thompson* with them, to admit proof of their contents to be received in evidence, is entirely wanting. There is no proof in the record that *Mr. Thompson* made or participated in them or in their circulation. It is needless to search the testimony of other witnesses upon this point. Except as *Jones* and *Jacobs* spoke, the record made by plaintiffs is silent.

The testimony of *Jones* and *Jacobs* was objected to for incompetency and want of foundation. The applicable rule of evidence was settled in Nebraska by *Gerner v. Mosher*, 58 Neb. 144, as follows:

"The corporation may be bound by the act of its constituted officers, but when it is sought to charge officers *individually* for *ultra vires* acts, or for *misconduct*, it is only those who *participate* therein who are liable."

That rule of the highest court of the state, as applied to a non-federal ground of liability, is, no doubt, conclusive upon this court on the present writs of error. At the same time, it is in harmony with the holding of this court in *Briggs v. Spaulding*, 141 U. S. 132.

On appeal in the Supreme Court of the State, and on the writs of error in this court, *Mr. Thompson* has preserved his objections, and insists that in absence of proof of his participation in the so-called unofficial reports, the testimony directed to that issue cannot be considered. In determining an issue of fact the appellate court can only consider the evidence that is competent and properly received.

While plaintiffs offered no proofs of Mr. Thompson's participation in the alleged *unofficial* statements, and their proofs were not sufficient to tender that issue, *Mr. Thompson*, as a witness in his own behalf, spoke directly to his *non-participation*. He was the only direct witness on that subject, and to complete the review of the evidence we quote his testimony from the printed record:

(Printed Record p. 460.) Q. What personal knowledge did you have of the bank's sending out to its country bank depositors printed slips embodying the presumed totals of the reports of the bank to the Comptroller of the Currency?

A. Well that is a matter that I never gave any thought to; never knew anything about what their custom was, what they did in the bank about that sort of thing; no knowledge whatever.

Q. It wasn't a matter that you personally participated in?

A. No sir. Knew nothing of it.

Q. What if any knowledge did you have of the publication, or translation and publication of any of the reports of the bank's condition in the German language, in any German newspaper?

A. I had no knowledge of it.

Q. When did you first hear such a matter suggested?

A. On the witness stand here yesterday.

Q. Did you have any personal participation in that?

A. No sir.

On cross-examination *Mr. Thompson* testified to the same subject as follows:

(Printed Record pp. 517, 518.) Q. Did you know that the Capital National Bank carried a daily advertising card in the daily papers of Lincoln during its existence and while you were connected with it?

A. No sir. I would have no recollections as to that.

Q. You would have no recollection of seeing any card in which they advertised the bank, giving the names of the directors, and the capital, stock and surplus?

A. I wouldn't say that I did, or didn't; that would be a matter of advertising, and I don't read the advertising very often.

Q. You are a reader of newspapers?

A. I am not a reader of advertisements in newspapers.

Q. And I don't suppose you ever noticed any of the cards in the newspapers?

A. No sir. I have no recollection of noticing any.

Q. And never remember of having noticed any of the published statements of the bank's condition?

A. I have no recollection about the matter.

Q. You don't look at advertising matter, you say?

A. I do not. I don't have occasion to read advertisements. I usually know about what I want.

Q. Isn't it true that your eye will catch advertising matter, if you don't make a practice of reading it?

A. It is very likely.

Q. It is likely that you recall reading advertisements of Peruna in the newspapers?

A. Those matters are all a matter of the general conduct of a bank: something I didn't have anything to do with the placing of advertisements, and I would have no occasion for reading them.

On being recalled *Mr. Thompson* further testified (Printed Record, p. 763) as follows:

Q. Do you speak or read the German language, Mr. Thompson?

A. No sir.

We have quoted without abridgment all of the testimony on the issue of whether the so-called *unofficial* statements were the representations of *Mr. Thompson*. On that issue, upon which plaintiffs held the burden, the only testimony in the record is that *Mr. Thompson* did not participate therein and had no connection therewith. The testimony will not support a finding that *Mr. Thompson* participated in any such statements, or that they can be made the foundation of a judgment for tort against him on non-federal grounds. Upon this issue the record presents, not

an argument merely, but a demonstration, absolute and final, that the finding in the Supreme Court of Nebraska in favor of Mr. Thompson, on all of the alleged non-federal grounds of liability, was forced by the total failure of evidence, and was not due to a misinterpretation of section 5239 Rev. Stats. U. S. The references given demonstrate the insufficiency of the record to present a *prima facie* case of liability on non-federal grounds, the preservation of which can, in any event, call for a review of the holding of the State Supreme Court touching the scope and operation of that section of the federal statute.

XI.

The official statements attested by Mr. Thompson were upon the evidence adduced, too remote in point of time to have influenced plaintiffs to make the deposits remaining to their credit at the date of the failure of the bank, or to have been a proximate cause of the loss sustained by plaintiffs.

The *Jones National Bank*, in its petition alleged that it kept an open, active deposit account with the Capital National Bank, in which the balance varied on account of withdrawals and deposits. Between January 1, 1893, and January 21, 1893, its scheduled deposits amounted to \$12,263.70, and its withdrawals aggregated \$5,263.88. (Printed Record, pp. 5, 6.)

The *Bank of Staplehurst* alleged the same course of dealings, as did the *Jones National Bank*. Its transactions during the last three weeks with the failed bank, as alleged in its petition, showed deposits totaling \$18,095.59, and withdrawals of \$14,946.82. (Printed Record, pp. 5, 6.)

Both of these plaintiffs averred in their several petitions that, had *true* statements been made, they would have shown that the Capital National Bank was not "sound, solid and solvent, and that it was not a safe institution in which to do business, and plaintiff would not have made loans and deposits with said bank." (Printed Record, p. 7.)

This motive of self-interest, which plaintiffs aver guided them in their business transactions, we accept as the recognized standard by which, not only their own conduct, but also that of *Mr. Thompson*, is to be judged. Each of the suitors will be understood to have acted with reference to his own pecuniary advantage, so far as his knowledge disclosed to him the course of conduct that would be to his advantage. It is submitted that, as a matter of law, on the undisputed evidence, the reports attested by Mr. Thompson were all too remote in point of time to have

influenced plaintiffs in making the Capital National Bank a depository at the time of the failure, or to have been a proximate cause of the loss of which they complain.

Harry T. Jones, managing officer, and the only witness on behalf of the *Jones National Bank* to explain the motive inducement for its deposits in the Capital National Bank, testified as follows:

(Printed Record, p. 386.) Q. What reliance, if any, did you place upon those statements in depositing the money in the bank there and doing business with them, and *allowing it to remain there from day to day?*

A. I placed full reliance and credit in the statements; it is the only method that a bank has of knowing the condition of the bank with which it is doing business.

Q. If you had known of *any* of the discrepancies between the report and the actual condition of the bank, or of any of the fictitious entries to which you have testified as an expert, or of any of the irregularities, what would you have done, as an officer of the *Jones National Bank?*

A. *I would have withdrawn every dollar of the money.*

On cross-examination (Printed Record p. 395) Harry T. Jones testified further to the same subject as follows:

Q. * * * You say you scrutinized each new report at the time it came out?

A. Always.

Q. And, if I understand you correctly, the import of your testimony was that if whenever you saw one of these reports * * * you found any indication that the bank's condition was questionable, you would immediately have withdrawn your entire deposits while you had an opportunity?

A. I certainly would.

Q. So that *the last statement* that came out, *each time*, would be the *inducement each time* for you to leave your deposits there?

A. To a certain extent. Yes sir.

Q. And even though you saw indications in the last reports that the pecuniary condition of the bank was ques-

tionable, would you have left your money there on the faith of a previous report that showed up good?

A. I think not.

In the case of the *Bank of Staplehurst, E. Jacobs*, its managing officer, was the only witness who undertook to show its motive inducement for its deposits in the failed bank. He testified as follows:

(Printed Record, pp. 410, 411.) Q. The question is: What reliance did you place upon those statements?

A. I took full reliance on them that they showed the exact condition of the bank.

Q. State whether or not you believed them to be true?

A. I believed them to be true.

Q. And would the Bank of Staplehurst have made these deposits in the Capital National Bank from time to time, or permitted them to remain there at any time, had they known that these reports or statements were untrue?

A. No sir. *I would have them out the next day.*

On cross-examination (Printed Record pp. 414, 415) *E. Jacobs* testified further on the same subject as follows:

Q. That is, if the report had been true, and it had reflected the fact that the bank had had large losses, and wasn't prospering, you would have drawn your money out?

A. If the last report had come out with its true condition *I would have drawn my money out.*

Q. And you wouldn't have paid any attention to any previous condition of the bank?

A. No sir.

Q. You were interested in what the bank's condition was at the present month?

A. Yes sir.

Q. And you didn't care what the bank's condition was at any time previous to that?

A. No. *That wouldn't be any business policy at all.*

Without stopping here for further references, the National Banking Act requires at least five reports each year to the Comptroller, and both of the witnesses said they had scrutinized each of the five official reports each year as they came out. There were upwards of forty such

reports made and published during the period that *Mr. Thompson* was a director. The trial court found that *Mr. Thompson* did not attest more than five reports of the following dates: December 28, 1886; August 1, 1887; October 2, 1890; December 19, 1890, and July 9, 1891. The petitions each allege that the Capital National Bank did not suspend until January 21, 1893, more than one and one-half years after *Mr. Thompson's* latest attestation of any report.

The managing officers of both plaintiffs who sue *Mr. Thompson* have unequivocally committed themselves to the proposition that the making and maintenance of their separate deposits, throughout the period of upwards of a year and a half that elapsed after *Mr. Thompson* had attested any reports, was induced by the favorable showing contained in the reports subsequently attested by other directors, in which he in no way participated. Both affirmed that, but for the favorable condition reflected in each subsequent report, as it came out, their funds would have been withdrawn from the Capital National Bank, and they would have discontinued the making of deposits. They had absolute and continuing control of their deposits, and could have withdrawn them any day and closed their accounts.

If the merit of the cases made by plaintiffs be tested by the testimony of their managing officers, the record will demonstrate that the deposits for which they sue were not induced and did not remain in the Capital National Bank because of any report attested by *Mr. Thompson*. Liability is not here predicated on negligence, but rests exclusively on the proposition that plaintiffs were deceived by the official reports in which *Mr. Thompson* participated. Proof that the alleged loss was induced by reliance on *Mr. Thompson's* false statements is indispensable. The assets and liabilities of national banks are constantly changing, as the statutory requirement for five reports each year

recognizes. The petitions allege that each of the plaintiffs carried a constantly varying account. As a matter of law an ancient report of resources and liabilities gives no index to the *present* condition of a national bank. No banker would make a deposit in January, 1893, on the faith of Mr. Thompson's attestation of a report of date December 28, 1886, or August 1, 1887, or October 2, 1890, or December 19, 1890, or July 9, 1891. Each plaintiff is shown to have studied the altered condition of the bank as shown by each of the subsequent reports, which wholly superseded the prior ones. In these circumstances, it is submitted that, as a matter of law, there must come a time when the former reports will be too remote to induce a present deposit, and that the lapse of a year and a half, in a financial institution that makes five reports each year, is so remote that an action of deceit will not lie upon it for loss of *present* deposits. Aside from this consideration, the proofs are that plaintiffs in making the deposits lost in 1893 did not rely on the reports that came out on and prior to July 9, 1891. It is proved by the testimony that the losses were not entailed by reliance on reports so remote as those attested by Mr. Thompson. These considerations should dispose of the case of *Mr. Thompson*.

We shall now show, by record references, that the evidence wholly fails to support the issue tendered by plaintiffs that *Mr. Thompson knowingly made, or knowingly permitted, or knowingly participated* in any false official reports to the Comptroller of the Currency of the resources and liabilities of the Capital National Bank, required by Sec. 5211, Rev. Stat. U. S.

XII.

There is no evidence that Mr. Thompson knowingly attested or knowingly permitted or knowingly participated in any false official reports. Proof of a scienter is wholly wanting. The record forced on the State Supreme Court the finding of the insufficiency of the evidence to establish liability of Mr. Thompson under U. S. Rev. Stat. Sec. 5239.

But one aspect of the evidence is left for consideration. Did plaintiffs sustain the *onus* of proving that Mr. Thompson knowingly attested false official reports? We have, in all stages of the litigation, rested the defense of Mr. Thompson on the unimpeachable recitude of his own conduct. Having sued for deceit, upon alleged false representations contained in the official reports, plaintiffs have the burden under U. S. Rev. Stat. sec. 5239, of proving the moral guilt of *Mr. Thompson* in knowingly participating in false official reports; it is only for this that the statute visits upon the participating director the pecuniary forfeiture sought to be adjudged against him.

The trial court, whose judgments were reversed on appeal, undertook to rid the case of the federal questions, by specifically stating "that the liability of the defendant David E. Thompson, in an action of deceit under the principles of the common law, is not founded upon the attestation of the *official reports*." (Printed Record, case No. 501, p. 44.) It was also found that Mr. Thompson "had no actual personal knowledge of the truth or falsity of the reports made to the Comptroller attested by him, but in attesting such reports the court finds that *the defendant relied upon* the statements made to him by the president and cashier of the bank" etc. (Printed Record, Case No. 501, p. 27.) Superadded to this was a recital of *imputed* bad faith because he did not so perform the duties of a director as "to ascertain the truth or falsity of such reports before the same were attested by him." It was therefore found by both of the state courts that Mr. Thompson did not

consciously participate in falsifying the condition of the bank in any official report. The trial judge was aware that under the statute, as previously applied in the identical suits by this court, bad faith and a knowing falsification could not be *imputed* to Mr. Thompson from *mere neglect*, and hence he did not rest liability upon the official reports.

As a further premise to a recitation of the testimony, it is important that the latest report attested by Mr. Thompson was that of July 9, 1891. It has never been seriously argued that there was any circumstance proved that would cause Mr. Thompson to question the good faith or integrity of Mosher or Outcalt, the managing officers, or to suspect the prosperity and solvency of the bank, until a considerable period after the date of the last report which he ever attested. We submit it is established that Mr. Thompson confided in the stability and prosperity of the bank to the time of the failure, and until that time believed that the president and cashier had been faithful and honest in the discharge of their trust.

The trial court, however, fixed upon the *month* of September, 1891, without specifying any precise day, as a dividing point of time, previous to which the directors, who are now parties, had no sort of notice or grounds of suspicion of any falsehoods in the reports, or the integrity of the assets of the bank, and after which knowledge of such falsifications and of the doubtful character of some of the assets should be imputed to them. There is in the bill of exceptions (Printed Record, p. 73) a letter from deputy and acting Comptroller R. M. Nixon addressed to C. W. Mosher, President, without any direction that it be called to attention of the directors, which is, presumably the explanation of the court's fixing upon September, 1891, as the dividing point of time, after which knowledge should be *imputed* to the directors. This letter is an unsubstantial basis, since there was no proof that it ever came to the notice of the defendants.

The recitals of the trial court were as follows:

"The court finds that *from and after September, 1891*, the said Ellis P. Hamer, and the defendants Yates and Thompson and each of them had knowledge and knew that the statements official and otherwise of the bank were being made and published.

"The court further finds that said Ellis P. Hamer, and the defendants, Yates and Thompson, and each of them, *from and after September, 1891*, had knowledge and knew that said statements" contained material false representations. (Printed Record, Case No. 501, p. 45.)

The dividing point of time thus fixed by the findings of the trial court is fatal to the case of plaintiffs against *Mr. Thompson upon the official reports*. We do not accept these findings of the trial court, in so far as they are adverse. In so far as they recited that *Mr. Thompson* participated in any unofficial statements, we have already demonstrated that they were wholly unsupported. They were likewise unsupported, in so far as they recited *Mr. Thompson's* participation in official reports after September, 1891. In both respects they were contrary to the undisputed evidence, as was pointed out by the State Supreme Court. The argument here urged is that this dividing point of time, "*from and after September, 1891*," is a finding in favor of the defendants and against the plaintiffs on the issue of *scienter*, as applied to all acts done during and prior to the month of September, 1891. Mr. Thompson's last attestation was of the report of July 9, 1891, upwards of two months prior to the date when the finding first *imputes* any knowledge of falsifications to any of the directors.

The special findings, quoted elsewhere, show that Mr. Thompson did not attest a single report during any one of the years 1884, 1885, 1888, 1889, and 1892. There were two periods of two consecutive years in which he did not attest a single report. He attested one report in each

of the years 1886, 1887 and 1891, and two in 1890. The point of inquiry now is, whether he *knowingly* made, *knowingly* permitted, or *knowingly* participated in any falsifications appearing in any of the five reports mentioned. Did he act, at the time of the attestations, with guilty knowledge of falsifications, within the meaning of U. S. Rev. Stat. Sec. 5239? No circumstantial proofs against him reached back near to the date of his acts. The only testimony that goes to this issue is that of *Mr. Thompson*, himself.

It was the theory of plaintiffs that the Capital National Bank entered business as a hopeless insolvent. The history of the institution, as testified to by *Harry T. Jones* (Printed Record, pp. 183, 184), was that the original State Bank of *Marsh Brothers, Mosher & Co.* commenced business in January, 1882, with a purported capital of \$100,000. On June 23, 1883, it merged in the Marsh National Bank, with a purported capital of \$100,000. The Marsh National changed its name to the *Capital National Bank*, and increased its capital to \$200,000, and new account books were opened under date of June 2, 1884. It was to provide the additional capital of \$100,000 that *Mr. Thompson*, and other local men of high repute, were solicited for stock subscriptions, and invited by Mosher and Outcalt to sit in the directory of the enlarged bank.

Harry T. Jones went back into these ancient records to ascertain the occasion which induced Mosher and Outcalt to take new men and new capital into the concern. He compiled from the records a schedule of the losses previously sustained, on the basis of which he testified that when this change of organization took place the bank had sustained losses aggregating \$119,540.22, which exceeded its entire capital by \$19,540.22. (See Exhibit 00, Printed Record, p. 194.) To this, according to the testimony of *Harry T. Jones*, should have been added some losses on Harvester paper, and other slow and questionable items, greatly increasing the above total. The losses, however,

were said to have been hidden in padded accounts of worthless stocks and bonds, spurious, overdrawn collection accounts, fictitious items carried under the designation of bills of exchange, and the like.

Walter T. Scott, a witness for plaintiffs, testified to a declaration made by *Mosher* in connection with a reorganization and change of name of the bank: "They wanted to get R. E. Moore and D. E. Thompson, and such men as that, in, because *they would give stability to the bank*," etc. (Printed Record, p. 351.) In quoting *Scott* we do not indorse his credibility. He was shown to be a reprobate and moral degenerate, and his *veracity* was strongly impeached. But, whether he spoke truly or falsely, the *testimony* offered presented only the theory that *Mr. Thompson* was the victim of a swindle perpetrated by *Mosher* and *Outcalt*. The motive ascribed for *Mosher's* desire to connect *Mr. Thompson*, was to obtain his honored name as a source of public faith and credit for the ruined bank.

The showing noted implies that *Mr. Thompson* was, in respect to his stock subscription and his initial official connection with the *Capital National Bank*, the victim of a gigantic swindle perpetrated by *Mosher* and *Outcalt*, not only upon him, but upon all those whose subscriptions and connections were made in like circumstances, upon the public, and even upon the Comptroller who approved the showing of assets and granted the charter to the New Bank. It was the theory of plaintiffs that the *Marsh National Bank*, conducted by *Mosher* and *Outcalt* had failed; that their banking adventure had run its course to the end; that they stood over a powder magazine, at the counter of a ruined bank, and that, to prolong its miserable existence, desperate means had to be employed to replenish some part of the lost capital. In this extremity *Mosher* and *Outcalt* sought out the most conservative and influential men of the community, and invited them to subscribe for stock and sit in the directory of a new bank which should take over the assets and patronage of a supposedly flourishing

business, and continue under their own management. We quote from *Mr. Thompson's* cross-examination his explanation of the incident of his stock subscription:

(Printed Record, pp. 514, 515.) Q. You were acquainted with both Mosher and Outcalt before you became interested in the Capital National Bank?

A. No sir; I think I knew Outcalt in a way, but again showing perhaps my weakness, and lack of going into things as may be I sometimes should do to protect myself, I never had any acquaintance with those men at all—that is Mosher at all, and Outcalt I think I had simply known in a way for some little time before that, until Outcalt, I think it was—it may have been Mosher, came down to my office in the railroad building and told me that they were going to increase the capital stock in the bank and change its name, and wanted me to take some stock, and after talking the thing over with them I agreed to do it, and that is the way I went into the bank; I had no acquaintance before that with them, what you would call an acquaintance.

Q. How long did you live in Lincoln prior to that time?

A. I came back to Lincoln from Kansas—the Sante Fe road probably in November or December, 1878, and I had been there all the time, when I wasn't away from home; I wasn't like a resident would be, I was a railroad employee and *away from home most of the time*.

Q. How was it when you became superintendent?

A. I never had any business with anybody up-town in a business way until I went in that bank in 1884; that was the beginning as I remember it of everything of a business character in Lincoln, and then as time went on these other things came to me. Now when that was presented to me they told me who were going in the bank and the question of good faith never entered my mind as a matter of fact when I paid a premium and cash for the stock, and to do what I did I don't think my good faith could be questioned very much; I wouldn't be throwing money into a rat-hole, as that seemed to be, if I had known it."

The undisputed evidence is that *Mr. Thompson*, on the occasion referred to in the last quoted testimony, sub-

scribed for stock in the Capital National Bank of the par value of \$14,000, and paid therefor a premium of 9 per cent., making its cost \$15,260. (Printed Record, p. 429.) When the stock was, in 1886, increased to \$300,000, Mr. Thompson took \$11,000 of the increase at a premium of 15 per cent., making its cost \$12,650. The aggregate cost of his \$25,000 of stock in the bank was \$27,650. (Printed Record, p. 429.) We quote from *Mr. Thompson's* testimony the following:

(Printed Record, p. 431.) Q. I want to ask you Mr. Thompson, if you had any knowledge that that bank was without any capital, whether you would have put your money in there, and subscribed to the stock?

A. I certainly never would have done it.

Q. Did you know at that time who had been the managing officers of the *Marsh National Bank*?

A. Well, I simply knew as I would know anything that I hadn't any acquaintance with at all. I never had had any holding with the bank.

Q. Had you ever been a customer or depositor of that bank, previously, in any form?

A. No sir.

Q. Had you any previous acquaintance with either Mosher or Outcalt?

A. No. I hadn't. * * *

Q. Well, what within your knowledge was the standing and reputation of those men for business character and integrity?

A. It was first class.

Mr. Thompson attended the meeting at which the Capital National Bank took over the business. At that meeting *Mosher* was elected president, *Outcalt*, cashier, and *Walsh*, vice-president. Professor Stuart, W. W. Holmes and C. W. Mosher were appointed a committee for the purpose of taking over the assets of the old bank. Both Stuart and Holmes were men of the highest reputation. (Printed Record, pp. 431, 432.) *Mr. Thompson's* testi-

mony as to the arrangements made at this meeting for administering the bank was as follows:

(Printed Record, p. 432.) Q. Who were the active officers who had charge and control of the institution?

A. The active officers were Mosher, as president, and Outcalt, as cashier.

Q. You may state whether it was intended that they should devote their entire time to the business of the bank, or not?

A. Why, it was so understood at the time, that was the arrangement.

Q. Now, in actual practice, in the conduct of the affairs of this bank, from the time it entered business under the name of the Capital National Bank, who, to your knowledge, immediately and directly, conducted and administered the bank business of the institution? (p. 433.)

A. Mosher, as president, and Outcalt, as cashier; and for several years Professor Stuart and W. W. Holmes as executive committee; and later Dr. Hamer followed Mr. Holmes—some little time after the death of Mr. Holmes, he succeeded him.

Q. How much of your personal time did you devote, if any, to the affairs of the bank, and the administration of the bank?

A. None at all, except to attend meetings when I was in town. *I was much of the time away from Lincoln*, but when I was there I gave time enough to attend their annual meetings.

The foregoing testimony, which proves that *Mr. Thompson* was a confiding investor, paid a premium for his stock, at the solicitation of Mosher and Outcalt, and trusted, without restraint, the organization completed at the meeting in which he participated, is uncontradicted. Mere proof that *Mr. Thompson* was the victim of a swindle does not make a case of deceit against him in favor of plaintiffs under U. S. Rev. Stat. Sec. 5239.

We next exhibit the testimony of *Mr. Thompson* concerning the circumstances under which he attested some

four or five official reports to the Comptroller during his eight and one-half years of office.

(Printed Record, p. 435.) Q. Now, what, if any, precaution did you take to ascertain the correctness or integrity of the reports before you attested them?

A. Well, I don't think ever I attested a report without asking the cashier, or asking Mosher—I think Mosher always brought them to me for attestation: This is right, is it? And the answer was yes; and I attested it.

Q. Did you ever attest any that did not appear to have been previously sworn to as correct by either the president or cashier of the bank?

A. No. They were always sworn to before being brought to me.

Q. What would be your honest belief in the correctness of the statement, if sworn to by these men?

A. I believed them to be correct.

Q. Did you believe so at the time?

A. I certainly did.

Q. Did you ever look over, or check over, any of the books of that bank?

A. I never did.

Q. Did you ever go back in the work room where the clerks and servants of the bank were working on the books and look over them there?

A. No.

Q. Did you ever examine the archives and securities of the bank for any purpose?

A. I never did. That was left to the executive committee, always.

Q. Did you appoint anyone to do that duty, or participate in the appointment?

A. The directors appointed the executive committee, whose duty it was to do that.

* * * *

(Printed Record, pp. 442, 442.) Q. What was your belief in the solvency and stability of that bank *up to the very time of its suspension?*

A. Well, I had no question of the solvency of the bank. I don't suppose a man could have been more astonished

over anything than I was to receive a telegram from Mr. Mullen that the bank had failed. I received it while in Terre Haute.

Q. Now, what knowledge, at any time, did you have, if any, that there were any false statements, or false entries, in any report to the Comptroller, made by that bank, which bore your own attestation?

A. I had no knowledge that there were any false statements in any of them.

* * * *

(Printed Record, p. 445.) Q. Up until the time of the suspension of the bank, did you ever have any knowledge that any false entries were made anywhere in the records or books of accounts there?

A. No information from any source, not even from the bank examiners who I always talked to.

Q. Nor from any teller in the bank, or clerk?

A. No sir.

Q. Nor from any officer or director?

A. No, sir.

Q. Nor from any personal observation of your own?

A. No, sir, from no source whatever.

* * * *

(Printed Record, p. 461.) Q. At the periods of time when you were absent from Lincoln what opportunity did you have, or what part did you have in the making of any reports of this bank to the Comptroller of the Currency, or in the publication of any statements? * * *

A. No part whatever.

Q. Did you have any knowledge whatever of the proceedings when, I think you said, you were in Europe?

A. No, sir. At no time when I was absent did I know anything of their proceedings.

Q. State what, if any, part you had in the making or publication of the report, other than to merely attest it, at any time?

A. I had no part whatever in it.

Q. Did you have any part in the reports which were not attested by you?

A. No sir.

Q. Did those ever come to your attention? Or were they ever checked over by you?

A. No, sir.

Mr. Thompson, in answer to questions put to him by plaintiff's counsel, on cross-examination, testified to the same issue as follows:

(Printed Record.) Q. Now, in reference to various statements of the condition of the Capital National Bank: When these various statements were made that bear your signature, what effort did you make before permitting them to go out in that way, to ascertain whether or not they were true?

A. Well, my only effort to know the truthfulness of any statement that was ever made there, was simply through the executive committee—the finance committee—and through the officers of the bank.

Q. You never looked over any of the assets yourself?

A. No, sir, never.

Q. Never counted any of its money?

A. Never counted any of its money.

Q. Never made any examination into the actual assets at all?

A. No, sir, I never did.

Q. Never examined any of the books of the bank?

A. No, sir. I never did. There was a committee that always had that in charge, a committee appointed by the directors, a finance or executive committee, and the officers of the bank, who always did that. I never had anything to do with that—anything on the inside of that bank?

* * * *

Q. When these statements went out purporting to give the condition of the bank over your signature, you hadn't at that time any knowledge concerning its actual condition?

A. Nothing at all, *except the information I would get from those I trusted.*

Q. But so far as personal knowledge went you knew nothing?

A. So far as personal knowledge went I knew nothing.

Q. And you were aware of that fact?

A. Well, there never was a question entered my mind.

never had in anything I was interested in, that there could be anything wrong.

Q. Well, you were aware of the fact that you didn't really know anything about its condition?

A. *It never entered my mind that way. I thought I did.*

* * * *

Q. And yet you made those statements in which you stated there are certain amounts of liabilities and assets and cash?

A. I made those statements after the sworn statements of the officers.

On re-direct examination Mr. Thompson was asked (Printed Record, p. 524): When you signed the four reports during the existence of the bank, to which your attention has been challenged on cross-examination, or rather when you attested them, you may state whether or not you believed the statements contained in them to be true?" And he answered: "Yes, sir, indeed I did."

Mr. H. J. Whitmore, the accountant employed by plaintiffs, testified to the results of the examination into the personal dealings of Mr. Thompson with the bank, as follows:

(Printed Record, p. 157.) Q. * * * Now what was the highest amount of indebtedness that the books of the bank show that Mr. Thompson had at any one time?

A. \$10,000.

Q. And for how long a period of time did he have as high an indebtedness as that to the bank?

A. From the 27th of August, 1887, to September 13th, 1887.

Q. At all other times when he had any indebtedness, it was for a smaller amount than ten thousand dollars?

A. Yes sir.

Q. Do the books show that all of his notes were paid?

A. Yes sir.

* * * *

Q. Now, I want to ask you what is your conclusion from an inspection of those notes (entries) as to whether they appear to represent regular and legitimate transactions with the bank?

A. I think they do.

Q. Is there any exception, when you could deduce any other conclusion, from any entry in the book concerning them?

A. No sir.

The foregoing testimony (including that of plaintiff's accountant) showing the integrity of *Mr. Thompson's* intentions, his faith in the bank's organization, his belief in the rectitude of all of the *official reports* which he attested, his non-participation in the reports which he did not attest, and the strict regularity of all his personal dealings with the bank, is not only unimpeached, but is uncontradicted. There is further proof in the record, however, that he had good grounds for the attestations which he made, and that he, at all times up to his telegraphic notification of the failure, believed in the skill and honesty of the officers and the stability of the bank. To these facts *Mr. Thompson* further testified as follows:

(Printed Record, p. 433.) Q. What personal effort on your part did you make to ascertain the condition of the bank?

A. Well, all the effort that could be made by canvassing the situation with the directors and executive committee who were a member of the directory, at the time of the meetings. * * *

A. The bank examiners were both men * * * that I knew very well, and I always asked them the situation as applied to the bank after they had made examinations, whenever I would meet them.

Q. State whether or not at any time you called for * * * or received reports of the condition of the bank by the president or cashier?

A. Well, at the meetings, they were always called for, and always received.

* * * *

Q. Now, you may state whether at any time when you were present and took part in the proceedings, when dividends were declared, there was any period of time when the reports of the officers to you did not show that there was a net profit exceeding the amount of the dividends? * * * *

A. No, sir. Never.

Q. And enough to put the requisite sum to surplus?

A. Always enough to put what was required to surplus, and had something over.

Q. At the time you acted in respect to declaring dividends what was your opinion and belief as to the truth of the showing?

(P. 434.) A. There was always a statement made by the officers of the bank and laid on the desk where the directors met, showing the gross and net earnings of the bank for the period that had passed since the meeting before.

Q. The question was, what belief or reliance you had upon the truth of that personally?

A. Why it was considered and thought to be absolutely truthful.

Q. So far as you thought yourself?

A. I had no question about it. Thought it was a truthful statement, of course.

Q. You may state whether from your inquiries of the bank examiners, you ever, from that source, obtained any information that would lead you to infer that the bank was not pecuniarily solvent?

A. No. On the contrary, the information I always got from them was always good.

Q. What was your personal belief from the time the bank was organized until it suspended as to the personal character and integrity of C. W. Mosher, and his skill as a banker? * * *

A. I thought he was perfectly correct.

* * * *

A. (Concerning Outcalt) I regarded him as an upright and capable officer, and a man of a good deal of wealth.

Q. And until the failure of the bank, how were the two men regarded generally in the community in which they did business?

A. As business men? As bankers?

Q. Yes?

A. Very highly.

A. And how, personally, did you regard the standing of your fellow directors in the bank, other than the president and cashier?

A. Well, very highly. I thought I was the cheapest one of the bunch.

A record of the minutes of a directors meeting of January 8, 1889, introduced by plaintiffs (Printed Record, p. 340) contains the following: "Mr. Thompson moved that directors Holmes & Stuart be appointed a committee to examine the notes of the bank, and also to make as many of such examinations of notes and books as they may see fit." There is also spread of record (same page) under a subsequent date, a report signed by the two directors named, certifying: "As per instructions of the board of directors we have examined the paper of Capital National Bank and find same satisfactory." The minutes of January 8, 1889, and of each subsequent meeting (pp. 340-344) contain showings of net profits justifying the payment of the dividends declared. The minutes of February 20, 1892 (p. 344) contain the following: "Upon motion of *Mr. D. E. Thompson*, E. P. Hamer was put upon the discount committee, in place of *W. W. Holmes*, deceased."

These incidents recited in the minutes indicate, plainly, *Mr. Thompson's* belief that the organization was an efficient one, and that he supposed the examination of the assets by a special committee, which reported, in writing, that they were found to be satisfactory, showed the affairs of the bank were in order. The authority of the commit-

tee to make as many examinations both of the notes and the books as they saw fit, was a continuing one, and he therefore felt, as he testifies, that the bank was properly conducted and in right condition. This belief was confirmed by the statement of net earnings shown in each report on which a declaration of dividend was based, so that the declaration and payment of dividends at semi-annual periods, instead of arousing suspicion, only confirmed his faith in the prosperity of the bank.

After testifying, as previously quoted, that he believed in the solvency of the bank up to the time of suspension, *Mr. Thompson* stated, circumstantially, the incident of his first knowledge of fraudulent conduct, as follows:

(Printed Record, p. 242.) Q. What was the first intimation you obtained from any source of any alleged wrong doings, or criminal misconduct of the affairs of that bank?

A. The first knowledge I had of any criminal conduct was after I got home from Terre Haute. (After the suspension.)

Q. State the source of it, without any explanation? Who told you?

A. Well, Mosher told me first.

Q. Did you ask Griffith? (The bank examiner who took the bank in charge.)

A. I met Griffith on the train, and he told me of the condition things were in there; but he didn't talk about criminal actions and I think that wasn't the subject of any of our conversations.

Q. Now when was the first time that you learned of any criminal misconduct, and what was the source of your information?

A. Well the first time was the night of the day that I arrived home from Terre Haute. * * * I went to Mosher's house that evening and I said to him: "What does this mean, Mosher? What have you been doing?" And he says: "I have done everything a man can do." I says: "Do you mean to tell me that what I hear about that bank is true?" He said: "Yes." I said "What are you

going to do about it?" And he said: "I want to get to the penitentiary as quick as I can get there."

Q. Did you have any knowledge of his faithlessness before that?

A. *Not a thing in the world.* They hadn't even arrested Mosher up until that time. The bank closed on Saturday and didn't open on Monday. I don't think I could possibly get back before Tuesday from Terre Haute, although I am not certain as to when I arrived. I came from there here, immediately, and it is a matter of some 24 hours from there to Lincoln; and I didn't, probably, get back until Tuesday, and at that time Mosher was in his house at home. They didn't arrest him then.

Mr. Thompson was less than 30 years old when he purchased stock and became a director of the Capital National Bank. Without educational training, he commenced railroad service at the age of 17, and continued actively in that service till January, 1890. From 1881 to 1890 he was a railroad superintendent, with heavy responsibilities and exacting duties. It was not possible for him to undertake or perform any general administrative duties in the bank. To this effect Mr. Thompson gave the following testimony:

(Printed Record, p. 437.) Q. * * * During the period that you were a director what other calls were there on your time?

A. Well, from the time I went in the Capital National Bank until 1890 I was superintendent of this Burlington road here, this Northwestern part of it, 1100 miles.

Q. What portion of it did you construct?

A. From Seward, on northwest here, nearly to Edgemont, South Dakota. After '90, when I left the road—I left the road near the end of December and I was a month, about, in Mexico, and came back here at the end of January, and immediately after that I went to Europe, coming back several months afterwards—and on my return I took charge of the Lincoln Gas & Electric Light Company, and the Farmers and Merchants Insurance Company. That I had been an officer in since its organization; and I also, at the same time, owned a lot of hotels scattered

around over the state and in South Dakota.

Q. About how many?

A. I think at that time I had nine. I had as high as thirteen, that is a half interest in them.

Q. Any connection of any sort with any other bank?

A. Yes. I was president of the Aurora State Bank.

* * * *

(Printed Record, p. 438.) Q. Did your duties as superintendent of the railroad require any long continued absences from Lincoln?

A. Well, very many of them, both long and continued.

Q. Have any conditions of health required any long or continued absence?

A. Well, I had very bad health for a good many years, so bad that in 1885 I was advised to go to Carlsbad in Bohemia, which I did. And in 1888 I had to go again; and in 1890 I had to go again. In 1890 was after I left the service of the road.

* * * *

(Printed Record, pp. 449, 450.) A. * * * I went to Mexico December 14th, 1889, and I got back from there on January 6th, 1890. December '89, I went there. There is no question about that in my mind, without any sort of reference, because I left the Burlington road in December, 1889. My salary, however, did not terminate until the end of January, 1890. But when I left the road, I took a car that they loaned me and took a lot of my friends and went with Governor Thayer and party, and went to Mexico. On this trip we left Lincoln on the 14th of December.

Q. What time did you go to Europe in that year?

A. I left for Europe on the 2nd of February, 1890.

Q. What time did you return from Europe?

A. I returned from Europe on the 9th of August.

In detailing the circumstances of his becoming connected with the Capital National Bank (quoted at length elsewhere) *Mr. Thompson* (p. 515) said: "I wasn't like a resident would be. I was a railroad employe and away from home most of the time."

In explaining that he was unable to verify his attestation of the report of December 28, 1886, *Mr. Thompson* said:

(Printed Record, pp. 461, 462.) A. I was superintending this railroad building up in Wyoming and Dakota, and the west end of Nebraska. Had charge of all the work that would come under the superintendent in construction of a road.

Q. Do you recall any specific instance of that year that would make your absence necessary?

A. Yes sir. That was the year we had a great deal of trouble up there, I remember; and for that reason I remember that I was a very large share of the time—in fact most of the time right in the center of the winter—there, away from home.

* * * *

(P. 426.) A. * * * We had immense quantities of snow and all the troubles that go with construction and snow together up there that winter; and was away a good share of the middle winter months, when the trouble was the thickest.

While Mr. Thompson repeatedly testified that he always attended the directors meetings when he was in Lincoln, minutes found in the printed record (pp. 334-345) show that he did not attend the meetings held on the following dates: Second Tuesday in July, 1885; Second Tuesday in January, 1886; June 21, 1886; July 13, 1886; July 10, 1888; January 14, 1890; July 11, 1890; January 12, 1892, and January 22, 1893.

After Mr. Thompson's retirement from railroad service he was abroad till August 7, 1890. He then took the direct and responsible management of the Farmers & Merchants Insurance Company, and the Lincoln Gas & Electric Light Company, and at the same time retained control of his personal enterprises. During 1891 he expended \$176,000 in reconstruction of the Gas and Electric plants, which he borrowed on his personal credit and no part of which was borrowed from the Capital National Bank. (Printed Rec-

ord, pp. 439, 440.) His services as director of the bank from 1884 to 1893 were "without any sort of compensation." (Printed Record, p. 428.)

The coincident employments and activities of *Mr. Thompson*, in connection with other enterprises in which he had the burden of responsible management, and the incidents of his life which kept him away from the bank and from Lincoln, during the larger part of the term of his office of director, are definitely established by uncontradicted testimony. All this was known to his fellow directors and the stockholders. It was not possible that *Mr. Thompson* could assume personal responsibility for the administrative conduct of the bank, nor that his fellow directors and stockholders expected him to do so. The utmost seriousness and good faith of his acts, in conjunction with his fellow directors, in selecting, as they all thought, capable and honest managers and assistants, and in making such inquiries as would satisfy him that the funds were prudently invested, and the affairs safely and profitably administered, stands unquestioned by any proofs in the record.

It would have been a vain and idle thing for *Mr. Thompson* to undertake any check of the management by an examination of the books or assets. He lacked all educational qualifications for a task of that sort. In answer to specific inquiries touching his qualifications in this behalf, *Mr. Thompson* testified:

(Printed Record, pp. 435-437.) A. Well sir, my father and mother both died before I was nine years old. Until that time my home was in the country, where there were no schools or school privileges, except the country schools. That was a mile and three-quarters from where I lived. After they died—my mother died when I was seven, and my father when I was nine—I went to town to live with an uncle, and from that time until I was thirteen years old I went to school. My education, so far as it applies to anything possible for me to have gotten out of an educa-

tional institution of any kind, was before I was thirteen years old. * * *

A. From the time I was thirteen until I was seventeen, I learned a trade, and when I was **seventeen I commenced** to work for this Burlington road. * * *

A. My first work for the Burlington road was *trucking* there in the Lincoln freight house. After that I was *brakeman* on a freight train between Plattsmouth and Lincoln. After that I was *baggage*man. All that came within a year. And at 18 I was a conductor. From 18 to 21 I was a conductor here on the Burlington road. The superintendent who was here at that time went to Atchison, Topeka & Santa Fe, at that time, and took me with him. After that I came back here and ran a freight train for two or three months, when I was made train master. And after something less than a year I was made superintendent of the Burlington railroad, division superintendent.

Q. Now during all that period did you ever perform any work on books?

A. No, never.

Q. Did you ever keep a set of books in your life?

A. No. That would be impossible for me.

Q. Could you go through the Certificate of Deposit account or the deposit ledger of that bank personally and find head or tail of any account, or check it up? Could you do it?

A. I could not.

Q. Could you at any time during your term of office as director?

A. Well, never, at any time during my life could I have done a thing like that.

* * * *

Q. And you wouldn't have taken, if tendered, any office in the directory? Could you have taken any committee office in the directory that would have required that sort of work, to perform your duties?

A. It never occurred to me until this moment, but there was a time when that thing was suggested, that they put me on one of these committees. And I said: "It is impossible, gentlemen. I couldn't do that sort of thing. I have no knowledge of that sort of work."

The circumstantial recitals, quoted from the record, were not intended as an assertion that Mr. Thompson was deficient in general business capabilities. It is admitted that few men equal him in endowment, in natural and acquired judgment of men, and in ability to command and utilize the technical skill of men specially trained. But few men can so well direct to practical ends the laboriously evolved theories of men of special training. An essential factor in his ability to discharge high responsibilities, was his appreciation and ready avowal of his own limitations. He assumed no responsibility for details that he could not comprehend. His lack of both educational and practical training, for the detailed and technical duties of banking, is so obvious, that it would be idle to present any discussion of the necessary inferences suggested by the quoted testimony. It was shown, however, that, in his relation to the bank, he acted precisely as he did in connection with varied enterprises which he controlled and successfully managed. To this effect we quote his testimony from the record:

(Printed Record, pp. 436, 437.) Q. You have had some business experience outside of your connection with this bank?

A. Yes. I have been very active all my life.

Q. Been the directing head of a number of important concerns?

A. Yes sir.

Q. And in your private, or in your other enterprises that you ran as the directing head, what has been your custom in regard to delegating the duties of accounting to others?

A. All business enterprises that I have been interested in I have always gotten somebody in the office who I thought was capable and honest, and, of necessity, have been compelled to let him, whoever he was, conduct the office.

Q. And did you trust these officers of the Capital National Bank any more fully than you did your own employees or the employees of the concerns that you directed?

A. Well, I never had a trust misplaced before; and I have had lots of experience with men in responsible places.

Q. Did you entrust these men any more fully than you have entrusted other men?

A. *In exactly the same way.*

Q. In what different particular did you perform the duties of director, in this bank, than you acted when you were running other and independent business?

A. *No difference whatever.*

On cross-examination Mr. Thompson said (Printed Record, p. 488):

"If it were necessary for me to understand the books of the Gas Company, or of the Insurance Company, or of any bank that I have been interested in—if I had to, under the law, understand the intricacies of those books—I couldn't have been in business. I would be shoveling dirt on the section, like I had to in the beginning." And also (p. 488): "Well, if I were going to invest in a corporation, I would have somebody inspect their assets, or else I would do it on faith."

An illustration of *Mr. Thompson's* trusting and confident disposition towards those into whose hands he puts his affairs, is the following answer found on page 450, printed record:

"A. Well, Mr. Mullen, all these years, in all 25 years, has been nearer myself, than I have myself. He has had perfect, absolute charge of all my private affairs, whether I have been away or whether I have been here, all the time. *Mr. Mullen has carried, for many years, from me, an absolute power of attorney to do whatever he pleases, no matter what it is.* He has never pleased to do anything wrong yet; but he may do like Mosher. He may fail me, but I am not worrying over that any."

An incident that followed close upon the bank failure proved that, *even after the failure*, Mr. Thompson not only had no conception of the magnitude of Mosher's frauds,

but that he risked his personal responsibility on the proposition that the bank's assets were sufficient for the discharge of all liabilities. Mr. Thompson was surety on the bond of E. B. Stephenson as City Treasurer of Lincoln. The City treasurer had \$21,560.39 on deposit in the bank when it failed. N. C. Brock offered to purchase the claim of the treasurer against the bank at 75% of its face. He consulted Mr. Thompson, who was obligated, as surety on the bond, for any loss. The advice given him by Mr. Thompson, according to the testimony of E. B. Stephenson (Printed Record, p. 543) was as follows:

"Mr. Thompson, with more anger than he ever displayed, before or since, in talking to me about anything, said that I ought to have more sense and more patience than to listen to gossip on the street about the failure of the Capital National Bank, and its assets and capabilities for paying out, and that he thought I ought not to suffer that loss. That if the bank's affairs were handled properly there were ample assets there to pay the depositors."

Mr. Thompson's testimony regarding the same incident was as follows:

(Printed Record, pp. 526, 527.) A. The treasurer, Stephenson, had something like twenty thousand dollars in there, as I remember it; and he came to me and said that he had been offered by Mr.—N. C. Brock, of Lincoln, had offered him seventy-five cents on the dollar for his claim, and asked what he thought I should do about accepting it. And I said to him I didn't think he ought to do it. He went away and came again. He came to me several times, probably three or four, each time rather pressing me to say to him that it would be best that he accept this seventy-five cents on the dollar that Mr. Brock had offered him. Mr. Brock had bought some other claims there and paid seventy-five cents for them. And each time he came I insisted in my talks to Mr. Stephenson that it would be a loss to him if he accepted that, and that he ought to stand for what the bank would give him. The outcome of it was

that, instead of getting seventy-five cents he got seventeen cents, and I got the privilege of paying something on the bond.

Q. In case the claim had been sold for 75c on the dollar, had Mr. Stephenson made arrangements by which he could discharge his whole liability, and not let any loss fall on you as bondsman? Had that subject been mentioned?

A. Mr. Stephenson said in his conversations with me that if he accepted the 75c he could clear his obligation with the City. That, with his own personal funds, seventy-five cents on the dollar would give him enough so he could take care of the obligation.

THE COURT: Why did you stand against that?

A. Mr. Stephenson was a friend of mine, and I didn't like to see him lose the money. Mr. Stephenson has been a friend of mine for many years, and I thought, in advising him as I did, that I was advising him to the end of getting the best results for himself.

The incident thus verified by two witnesses, both of whom are fellow townsmen of the man who made the offer, is not disputed. It speaks powerfully of *Mr. Thompson's* continued belief, even after the failure, in the integrity and value of the bank's assets. On that belief he risked a liability which ultimately fell upon him, that he could well have escaped if he had been willing that the treasurer should have suffered a loss of 25% of his deposits. *Mr. Thompson's* conduct must be judged, "not by the event, but by the circumstances under which he acted." This circumstance is inexplicable, except upon the theory of *Mr. Thompson's* faith, at that time, in the adequacy of the assets to pay all deposits in full.

The Lincoln Gas Company, and the Farmers & Merchants Insurance Company, which *Mr. Thompson* controlled and managed, and other institutions in which he was concerned kept active deposit accounts in the bank to the date of its suspension. *Mr. Thompson* testified that the deposits in the accounts which he absolutely dictated

amounted to between twenty-eight thousand and twenty-nine thousand dollars. (Printed Record, p. 441.) This fact was confirmed, in detail, by *Harry T. Jones*. (Printed Record, pp. 738, 739.)

At the same time, Mosher & Outcalt were owing him on their joint note \$22,500. Mosher was guarantor of a loan of \$10,000 made by Mr. Thompson to J. W. Furgerson, and Mosher was also trustee of \$2,000 of stock of the bank for the benefit of Mr. Thompson's daughter. The insurance company, of which Mosher was treasurer, was a financial institution, that on account of the failure of the bank which was its depository, Mr. Thompson was obliged to sustain with his personal credit. Mr. Thompson also sustained with his personal credit The American Exchange Bank of Lincoln, of which he was vice-president. Mr. Thompson also paid an assessment of \$1,000 on his bank stock, and he and the companies controlled by him, in which Mosher and Outcalt had been interested, became enmeshed in much litigation. No other individual suffered so much from the failure. According to the standard of self-interest, as the governing motive of business transactions, which the plaintiffs assert controlled the deposits which they made, *Mr. Thompson* must have thought, to the very last, that the bank was sound. There is no other explanation of his failure to withdraw the \$28,000 of deposits which he absolutely controlled, as both *Jones* and *Jacobs* swore they would have done on the first suspicion of the bank's instability.

Mosher's connection with enterprises controlled by Mr. Thompson has been the subject of criticism by counsel for plaintiff. But that circumstance only confirms the previous faith of Mr. Thompson in Mosher's integrity, to which he repeatedly testified.

Repeated incidents of Mr. Thompson's examination as a witness emphasize his high standard of moral rectitude. There were but few instances in which he betrayed any irritation, and these merely displayed his aversion to the petti-

ness, narrowness and subterfuges resorted to by examining counsel. One of these incidents was an inquiry, in reference to his participation in placing the bank advertisements, of whether he could recall reading advertisements of *Peruna* (p. 518). Ignoring counsel's attempt at witty diversion, Mr. Thompson explained that placing of advertisements was a matter of the general conduct of the bank, with which he had nothing to do. Another incident was a sneer at John R. Walsh, formerly a banker of prominence in Chicago, whose letter of credit Mr. Thompson carried to Terre Haute just prior to the failure of the Capital National Bank, and who was, at the time of the present trial, in a federal prison. Mr. Thompson was prompt to acknowledge the assistance Mr. Walsh had given him and the banking situation in Lincoln during the panic of 1893, and to say: "I have always had a very kindly feeling for Mr. Walsh, *although he is in prison now*" (pp. 493, 494). Another incident was an insinuating suggestion by counsel that Mr. Thompson's secretary, *Mr. Mullen*, was "in position to take the blame for anything if it were necessary." The answer of Mr. Thompson to this insinuation was: "No. Mr. Mullen isn't a man that would take the blame for anything he wasn't responsible for; and you know that, and everybody that knows him knows that." (Printed Record, p. 517.)

These, and other similar incidents, which put counsel in the wrong, and from which counsel suffered by comparison with the witness, were employed in the argument to demonstrate the masterful intellectual powers of Mr. Thompson. But, in truth, they showed only the moral aspects of the witness. Instinctively he avowed his former business associations, and gave credit where it was due, to the fortunate and the unfortunate. It was the reflection of his sturdy business morals that exposed the shams and pretenses of examining counsel, rather than his high intellectual endowment; and it was the moral element that gave force and conviction to the witness's intellectual processes.

We have now faithfully exhibited the proofs directed to the issue of whether *Mr. Thompson* knowingly made or knowingly participated in any falsehoods contained in the four or five official reports which bore his attestation. (*Mr. Thompson* was unable to verify his attestation of the report of December 28, 1886. Printed Record, p. 461.) No other witness spoke to the questions covered by the testimony of *Mr. Thompson* above set forth. It will be vain to search the records for contradictions. There are none. Except as *Mr. Thompson* spoke to these facts, the record is silent. Against the pretenses of plaintiffs that proof was offered against *Mr. Thompson* on the issue of *scienter*, and that he *participated* in reports of a later date than July 9, 1891, *which he did not attest*, we have quoted the testimony, circumstantially, in the precise words found in the printed record.

The record shows affirmatively, and without contradiction, that *Mr. Thompson* had no knowledge of falsification in the official reports attested by him; that he did not, in any manner whatever, participate in any report, official or unofficial, except to attest five reports mentioned in the special finding previously quoted; and that he had no part in these five reports, except to attest them upon oral assurance of the president or cashier, whose knowledge was superior to his own, that they were correct, and after they had first been verified by the oath of one of the managing officers of the bank.

The record conclusively establishes that these attestations were made by *Mr. Thompson* in good faith, and that he believed implicitly in the soundness of the bank up to the time of its failure. The record shows without contradiction that *Mr. Thompson* did not attest any report heedlessly or recklessly, nor without previous information of its correctness, obtained from the president or cashier, whose knowledge was superior to his own. To the contrary, he always acted on information from that source which he credited, and which, as a director, he had a right

to credit. The Act of Congress which created and defined the duties of his office, permitted the directors to delegate administrative duties to the president and cashier; and Mr. Thompson's reliance on their sworn and oral verifications, and his belief that he had, from that source, such reliable information of the correctness of the report as gave good grounds for the attestation, were justified.

No direct testimony was offered or received to show knowledge in *Mr. Thompson* of falsifications in any one of the reports which he attested; neither was there proof of contemporaneous circumstances, transactions or declarations to show, circumstantially, that he had such knowledge. Mr. Thompson spoke circumstantially and in detail concerning his official acts, and the uncontradicted showing leaves the essential element of *scienter*, not only unproved, but affirmatively disproved. The question of policy, whether the director's liability should be absolute, or conditioned on a wrong *knowingly* done, was for the Congress, which wisely determined it by U. S. Rev. Stat. sec. 5239. Had it been intended that the director's liability should attach upon mere proof of the falsehood contained in the report, the forfeiture would not have been conditioned on guilty participation in a conscious, or *knowing*, wrong or fraud.

If the degree of faith reposed in the bank and its officers be measured by the extent of the personal misfortune, then *Mr. Thompson* was more confiding than the other depositors who claim relief against him. If his conduct as a director be tested by the methods he employed in the concerns which he personally managed, *Mr. Thompson* is shown to have applied the same identical methods to the affairs of the bank in which he participated. If, before attesting a report, he should require such information of its correctness as he would credit in ascertaining the condition of a concern which he personally managed, his conduct also meets that requirement. From whatever angle the evidence is viewed it exhibits an entire failure of proof on the essential element of *scienter*. Mr. Thompson has at all stages saved the con-

tention that there is an entire want of evidence to establish liability against him under the federal statute. That has been his reliance, and if the sufficiency of the proofs is an open inquiry, it is submitted that upon that issue final judgment must go in favor of *Mr. Thompson*, and against plaintiffs in error.

XIII.

The theory of liability presented in the brief of plaintiffs in error, as applied to Mr. Thompson, is an abandonment of the cause of action for deceit. It has been repeatedly adjudicated that the charge of deceit, or false representations, is the only cause of action pleaded that, in any event, is maintainable by plaintiffs.

It is suggested in the brief of plaintiffs in error that liability against Mr. Thompson in this action may be predicated upon his neglect to perform administrative duties. We have shown elsewhere that this theory is false and has been repeatedly rejected in the pending litigation. The only wrongs alleged in the several petitions, which are personal to the individual plaintiffs, are that the plaintiffs were deceived by false statements made by defendant. We have also shown that any cause of action for neglect of administrative duty is not one that can be maintained by individual plaintiffs, but is an asset of the bank in which all of the stockholders and creditors are interested, which must be prosecuted in the name of the receiver for the use and benefit of all creditors and stockholders.

The brief of plaintiffs in error also suggests extreme notions of the duties of directors, which have no application to the pending actions of deceit. This suggestion was fully exploited in the argument of plaintiffs in error on the former hearing in this court and was ruled adversely to plaintiffs in *Yates v. Jones National Bank*, 206 U. S. 158. If the common law rules were open and admissible, the authorities cited under this head could have no application to the pending issue.

Martin v. Webb, 110 U. S. 8, like the other cases cited, has no bearing, direct or remote, upon the issue of agency in the present suit. That case presented the sole question of whether a bank was bound by a release in the name of the bank, executed by the cashier. The imputed knowledge of the directors, mentioned in the opinion, related solely to matters involved in the dealings of third persons with the corporation in behalf of whom, alone, relief was sought on the ground that the cashier had exceeded the authority of his agency for the corporation.

It will be fruitless to pursue the further references. We do not contest the doctrine that a corporation should be bound by the acts of its own officers, within the real or apparent scope of their authority, touching the subject-matter of the agency. Under that doctrine the official acts of the officer are the acts of the corporation, imputed to the corporation as a matter of law. No one doubts this. But any personal relation of agency of an officer of the bank to act in the personal right of an individual director, is not presumed. In his personal right the director acts for himself or by some agency of his personal selection and creation. Authority of an officer of the bank to act for a *director* of the bank, as distinguished from the *corporation*, is not presumed. The officer's right to represent the corporation is the very subject-matter of his agency. His right to represent the individual director is not of the subject-matter of his official agency. (*Gerner v. Mosher*, 58 Neb. 144.)

XIV.

The mere fact of attestation does not foreclose the issue of knowledge, against the attesting director. This court decided on the former hearing that the burden of proving the director "knowingly" attested a false report, is by U. S. Rev. Stat. sec 5239, thrown upon the plaintiff.

It is also suggested in the brief of plaintiffs in error that the attestation of the official reports was an affirmation of positive personal knowledge, and consequently a fraud, within the meaning of the federal statute, if the statement turned out to be untrue, without regard to the director's honest belief in the truth of the statement and without regard to the existence of reasonable grounds for the attestation. This point is concluded by the judgments rendered on the previous writs of error in this court. This theory would relieve plaintiffs of the burden of showing that the director knowingly made or participated in a false statement; because, according to plaintiffs' contention, the attestation is a direct and positive assertion of the director's knowledge, so that the attestation proves, by the director's own declaration, that he had actual knowledge of its falsity. Under this theory, the only proof required on that element of the case would be that the statement was not true in point of fact. The adoption of that theory would have required the affirmance of the judgments upon previous hearings in this court. It is entirely clear that the point is concluded by the previous judgments in this court.

The same argument was presented by counsel to this court at the previous hearings, as the brief on file will show, and as the report of that brief in 51 L. ed. (U. S.) 1005 indicates. Notwithstanding the presentation of the argument, the former opinion in these cases (206 U. S. 171, 172) quoted from *Gerner v. Mosher*, 58 Neb. 135, the definition of the Nebraska Supreme Court of the word "attest," and expressly repudiated the same argument that is presented in the briefs on the present hearing.

The issue now presented is: "Is the decision of the State Supreme Court in harmony with the governing rules of liability which this court announced upon the previous writs of error?" The tedious and laborous exploitation of the points, already ruled adversely to plaintiffs in error, imposes a needless burden upon the court and furnishes no assistance in the solution of the issues raised on the record.

It is repeatedly suggested in the brief of plaintiffs in error that the case involves the issue of whether directors have any obligation to exercise their functions. It is entirely patent, however, that the sole issue in the case is whether Mr. Thompson, as an individual, knowingly made and published false reports which deceived plaintiffs to their injury. The presentation of the sham issue suggests an unwillingness to argue or exploit the only ground of liability presented by the pleadings.

U. S. Rev. Stat. Sec. 5239, does not make the liability of the director *absolute*, but *conditions* the liability upon the wrongful act being *knowingly* committed. The element of *scienter* thus expressly written into the statute, involves an inquiry in some form concerning the good faith of the director charged with personal liability. This presents a strong analogy, if not an identity, to the situation involved in *Ripley v. U. S.*, 220 U. S. 491.

Ripley v. United States, 220 U. S. 491, involved an issue of *good faith* of an inspector of government contract work. The finding of the Court of Claims *imputed* bad faith to the inspector. In rejecting the finding as equivocal and inconclusive, MR. CHIEF JUSTICE, in the opinion said:

"It was the clear duty of the court below in dealing with the question of bad faith on the part of the government inspector, not to leave that subject dependent upon an ambiguous expression, susceptible of being construed one way or the other, but to explicitly find whether or not that which it states was manifest was or was not known

to the inspector, and whether that subordinate official acted in good faith in the various refusals recited as having been made to the laying of the crest blocks, and the reasons assigned for those refusals."

The case being remanded for specific findings again came before the court and in *Ripley v. United States*, 222 U. S. 144, Mr. CHIEF JUSTICE said:

"Thus, in the first place, while paragraph 1 finds that the inspector knew, at the time he made the refusal to permit the placing of the crest blocks upon the foundations, that they had sufficiently consolidated to be able to receive the blocks, this is qualified by the statement that such knowledge on the part of the inspector was but derived from the period which had elapsed between the building of the foundations and the time when the refusal to permit the laying of the crest blocks was made. But this qualification causes the paragraph to be ambiguous as to the existence or non-existence of good faith on the part of the inspector, since there is nothing in the paragraph which directly or indirectly establishes that the mere lapse of time, in view of the nature and character of the work, the materials which had entered into it, and the situation in which it was placed, to have been in good faith when he refused to permit the crest blocks to be laid."

Where the question of *good faith* is in issue, as it necessarily is in issue under the statute requiring proof of a *scienter*, the onus of proving *knowledge* and *bad faith* is upon the plaintiff.

XV.

The alleged testimony of R. C. Outcalt should be excluded from consideration.

In one or more instances, plaintiffs' brief refers to alleged testimony of R. C. Outcalt. But the testimony of Outcalt was not taken in the present suit nor upon the present issues, and no notice or opportunity of the defendants to appear and examine the witness or cross-examine him, with reference to the present issues, was ever afforded. The printed record (p. 653) shows the following proceedings in relation to the admission of the alleged testimony of Outcalt:

"Mr. Thomas: Plaintiffs offer in evidence the following portions of the testimony of Mr. Outcalt in the case of Kent K. Hayden Receiver against David E. Thompson and the other defendants in this action, and others, tried in the Circuit Court of the United States for the District of Nebraska, some time during the year 1897.

"Mr. Rose: Each of the defendants objects to the offer of the testimony as hearsay, incompetent, no foundation laid; not taken in any manner authorized by law to entitle it to be received in this case, nor taken in any proceeding had between the same parties nor under the same issues, nor authenticated in any manner whatever to entitle it to be received, and not binding upon either of these defendants, and in a matter and action entirely between other parties.

"We admit that the testimony, or purported testimony of R. C. Outcalt in the record presented here in court bears the signature of R. C. Outcalt, written in his own hand at page 790 thereof; said testimony beginning at page 704 and extending to and including page 790.

"Mr. Thomas: It is not contended on the part of the plaintiffs that the parties to this suit were the same, nor that the issues were the same, and all that is contended is that the Receiver in that case brought an action against the parties in that action who are the defendants in this action, and that this testimony here pertains to matters which are involved in this action, and we contend that it ought to

be admissible as being an admission of Mr. Outcalt, and as such evidence against the defendants in this action upon the theory that it is an admission of a joint tort feisor.

"Mr. Rose: On that theory our previous admission is that it is the signed declaration and bears the genuine signature of Mr. Outcalt, and we further admit that the record here present is the record of Mr. Outcalt's evidence taken in the suit referred to and prosecuted in the Circuit Court of the United States for the District of Nebraska.

"But with this admission we still insist on the objections that it is hearsay, incompetent, no foundation laid; not taken in an manner authorized by law to entitle it to be received in this case, nor taken in any proceedings had between the same parties nor under the same issues, nor authenticated in any manner whatever to entitle it to be received, and not binding upon either of the defendants, and in a matter and action entirely between other parties.

"Objection overruled.

"Each of the defendants excepts."

The judgments were reviewed in the State Supreme Court upon appeal where defendants insisted that Outcalt's declarations were incompetent. There was no contention made in the Nebraska Supreme Court that the testimony of Outcalt could be considered in determining the sufficiency of the evidence. The evidence was not taken or received in conformity either to the laws of the state of Nebraska or the acts of congress. It was not admissible as a declaration of Outcalt. Outcalt is not a present defendant and the statements were not made while the bank was in existence. The question of evidence was controlled in the state court by *Stratton v. Oldfield*, 41 Neb. 702, in which reference was made to *Logan v. United States*, 144 U. S. 263.

XVI.

The insinuations against Mr. Thompson contained in the brief of plaintiffs in error, pages 97-110, are based wholly on garbled statements of the evidence, and are unsound in their deductions and morals.

They are without legal significance, because they are all based on incidents occurring long after any attestation was made by Mr. Thompson; and they do not reach the issue of scienter, which must affect him at the time he acted.

Insinuating characterization cannot supply the absence of proof on an essential element of plaintiffs' case. Such characterizations may appeal to a particular taste in presentation, but it is demonstrable that not a single incident referred to in the phenomenal presentation bears upon the issue of Mr. Thompson's knowledge of any falsity embraced in the official reports attested by him, nor on his good faith and honest belief in their correctness. Recalling that the burden of the plaintiffs in error is to prove by a preponderance of the evidence that Mr. Thompson knowingly made and published false statements by which plaintiffs were deceived, let us pursue the task of demonstrating that the studied aspersions continued in the brief, beginning at page 97, are pointless.

At page 80 of their brief, counsel enumerate the dates of the reports which the proofs show were attested by Mr. Thompson, as follows: December 28, 1886; August 1, 1887; December 1, 1890; July 9, 1891. The issue is whether Mr. Thompson *at the time he acted*, the latest date being July 9, 1891, had knowledge of any falsifications in the official reports; or whether he knowingly attested a report which contained false statements.

The first incident mentioned as a circumstance against Mr. Thompson, to prove that he acted with knowledge, is the Comptroller's letter of September 8, 1891. But that letter could not have been the vehicle of knowledge to

Mr. Thompson, when he acted at the prior date of July 9, 1891. In exploiting this incident, counsel call attention to the circumstances that it was made "shortly *after* the official report of July 9, 1891, which had been signed by Mr. Thompson, and called specific attention to the fact that the official report misrepresented the item of overdrafts in the sum of nearly \$43,000.00." But the letter, which was addressed, not to Mr. Thompson, but to C. W. Mosher, copied in the brief at page 83, makes mention, not of the report attested by Mr. Thompson, but of an intervening report of August 19, which was not attested by Mr. Thompson. Again, the letter referred to contained no direction that it be brought to the attention of Mr. Thompson or any other director. There is no proof that it ever came to Mr. Thompson's notice. Mr. Thompson testified, unequivocally, that he had never seen it until his attention was directed to it, in the old record at the time of the present trial in Seward County. To this fact we quote his testimony from the printed record, (p. 462) as follows:

"Q. There is a certified copy of a purported letter by the Comptroller of the Currency addressed to Mr. C. W. Mosher, president of the Capital National Bank, of date September 8, 1891, which purports to have been written by R. N. Nixon, deputy and acting Comptroller. Had your attention been called to that letter during the trial and the alleged copy of a copy?

"A. I read it this morning in the record; that is the only time.

"Q. What is the fact whether that letter was called to your attention during the existence of the bank?

"A. It was not; the first time that ever I saw that letter was this morning, while I had that record, and will add that I never looked over the part of it that that letter is in; this morning when you called my attention to it was the first time I ever saw it."

Plaintiffs offered no proof of any character that the letter referred to ever came to the attention of Mr. Thompson. There was no foundation laid even for the introduction of the letter and it cannot, of course, be considered for any purpose against Mr. Thompson.

The next incident mentioned is an alleged meeting of the directors in a diminutive little room connected with the entrance to the safety deposit vaults, which the brief states was *after* the receipt of the letter of September 8, 1891. This alleged incident, like the letter of September 8, was at too late a period to have any relevancy upon or significance to the issue of *scienter* as applied to Mr. Thompson's attestation of any report, the last act of attestation having been long before the incident occurred. The incident mentioned was flatly denied by Mr. Thompson and was supported only by a single witness, *Walter T. Scott*, a moral degenerate and reprobate, whom *Harry T. Jones* had picked up on the streets of Lincoln and brought to Seward. Scott claims to have been, at the time in question a delinquent debtor of the bank and to have come to the bank in the afternoon, after closing hours, on the call of Mosher. The sole testimony addressed to the incident, by plaintiffs was Scott's testimony (Printed Record, p. 353) as follows:

"A. I think they were having a meeting there of the stockholders when I went in.

"You mean directors or stockholders?

"A. Directors, or whatever you call them, and there was a number of them there; there was Mr. Mosher and Mr. Outcalt, and A. P. S. Stuart and H. J. Walsh and D. E. Thompson and several others; I didn't see them all, but when Mosher came out of the room,—when I went in they was talking pretty loud, seemed to be quarreling about something; some letter they had got from the Comptroller, and Mosher when he came out he seemed flushed and angry, and I overheard Mr. Thompson say that he thought the whole thing was rotten right through and he was going to get out of it."

On cross-examination (p. 363) Scott testified as follows:

"Q. Did you hear Mr. Thompson make any mention of what it was that he thought was rotten.

"A. He just said he thought the thing was rotten all through and he would get out of it.

"Q. What was it he referred to,—you didn't catch what he referred to, did you?

"A. No.

"Q. And you don't know to this day what he referred to?

"A. No, I don't; I suppose it was about the bank.

"Q. You didn't hear him say anything more than that?

"A. No sir; I wasn't in there only as I told you, just about two or three minutes."

The purpose of introducing Scott was to impute knowledge to Mr. Thompson, not otherwise shown, of the letter of September 8th. In this the effort failed, as the quoted excerpts from Scott's testimony prove. There was nothing mentioned that connected the conversation with the subject-matter of Nixon's letter.

Mr. Thompson (Printed Record, pp. 455, 456) in a detailed and circumstantial way, exposed the falsity of Scott's testimony. We quote the following questions and answers from Mr. Thompson's testimony:

"Q. Did you in the forepart of September, 1891, or at any time in that month, attend a meeting of the stockholders or directors after banking hours in the little room leading to the customers' safety deposit boxes?

"A. Well I never attended a meeting at any time in that room.

"Q. Was there any meeting of any sort held at such time and under such circumstances, at which you were present in the month of September, referred to by Mr. Scott, in 1891 in the room specified?

"A. No, I never attended a meeting at any time in that room, it would be practically impossible to hold a meeting in that room."

Mr. Yates also denied his presence at any such meeting. The incident imputed to Mr. Thompson of expressing disapproval of some supposed misconduct would not be discreditable, but would merely betray the conceptions of *Harry T. Jones* and *Walter T. Scott* of Mr. Thompson's business rectitude. It would also imply his previous faith in the bank and could not affect his liability for deceit based upon the reports which he previously attested. But the testimony was false and the incident fabricated.

Sister Ida of the Tabitha Home, a charitable institution, of which Scott was for ten years an inmate (Printed Record, p. 607), W. H. Mendenhall, an employe of the Tabitha Home (p. 610), Mrs. R. A. White, a member of the board of Tabitha Home (p. 611), H. B. Miller, the physician of Tabitha Home (p. 619), William C. Rhode, the health officer of Lincoln (p. 623), Fred Foster, City Attorney of Lincoln (p. 624), and Claude Wilson, an attorney at Lincoln (p. 626) all testified that the reputation of Scott for truth and veracity was bad. Dr. Miller, upon an intimate and long standing acquaintance with Scott's habits and propensities, pronounced Scott a moral degenerate, and if permitted to class that species of degeneracy as insanity, would pronounce him insane.

In so far as the incident referred to has any bearing upon even the moral aspect of Mr. Thompson's conduct, this court would hardly, on the showing mentioned, criticise the State Supreme Court for reaching a conclusion that no derogatory inferences could be drawn from it against Mr. Thompson.

The next incident mentioned in the brief is the sale by Mr. Thompson at the price of \$125 per share of bank stock of the par value of \$18,000. But this incident, like the Nixon letter and the fabricated meeting following the letter, comes too late to have any significance on the issue of *scienter* as applied to any attestations of official reports made by Mr. Thompson. The transaction was had Novem-

ber 14, 1891, more than four months after the latest report attested by Mr. Thompson. The *bona fides* of the transaction in question was clearly established by the proof. Practically the only testimony in the record upon which the *bona fides* of the transaction must be judged is that of Mr. Thompson himself, who was questioned at great length. In his direct examination (Printed Record, pp. 443, 444) Mr. Thompson testified as follows:

"Q. Now, you may just give the reason for disposing of that stock,—you may state, who did you sell it to?

"A. I sold it to Mosher and Outcalt through negotiations with Mosher.

"Q. At what rate?

"A. At a premium of 25 per cent.

"Q. How many shares did you sell?

"A. \$18,000 face value; \$22,500 was what I was to receive for it.

"Q. Now you may just state briefly the reasons and circumstances under which you sold that stock to Mosher.

"A. The reason for selling the stock to Mosher was this: In coming from Chicago on the evening train,—leaving there in the evening and reached Lincoln the next day, I got on the sleeping car and went to my berth, and sitting in the section just ahead of me was a woman and on the right side just opposite was Mosher. The woman I recognized was a woman of the town, in Lincoln, and there was nothing said between Mosher and myself all the way home; simply said 'How do you do' but there was no more conversation between us, and I went to the porter,—he was a porter that I knew very well and a man that had been on the road a great many years,—and I said, 'Porter, who are these people here?' I wanted to see if he knew who they were, and he said, 'I don't know who they are, but' he said, 'they just had an awful time,' and I said, 'What do you mean?' 'Well,' he said, 'just an awful time between them' and I fancied that she had probably been drinking, from what he said. Any way Mosher and she were together, and they were going back home. When we got in Lincoln that morning, after we got in

there I telephoned to Mosher that I wanted to see him, and he came over and I said, 'Mosher, I am going to sell my stock in your bank, and if you want it you can have it, and if not somebody is going to get it.' And he said, 'Why?' I said, 'There is no use for us to talk about why, you understand perfectly why' I said, 'I talked to the porter about your trip to Chicago, and that's all I have got to say about it, but my stock is for sale.' And he said he would buy it and asked me what I wanted for it, and I said 'Whatever is right,' and he said, 'Is 1-25 all right?' And he said 'Will you take Outcalt's and my notes?' and I said 'Yes.' 'Well,' he said, 'how about security?' I said 'You needn't give security unless you want to; you can have the stock and give me your notes' and he said he would give gas stock security and that was the transaction. And it was done as quickly as we are talking about it here now, because I didn't spend any time abusing him. I told him what it was for, and he knew what it was for. I wanted him to take all of it, but he said he would take all but \$1,000, and I let it go that way and things went on except after that I didn't have very much to do with him. No reason except just a personal reason, that was all.

"Q. Now had you ever had any grievances against Mosher, or difficulty with him?

"A. No, I never had.

"Q. Except the instance of his social degradation, in that respect.

"A. No there never was a word between us about anything else, so far as I know of, but I had heard of this sort of thing before and that was the culmination of it, and that is the way I finished it."

The wife of Mosher was the daughter of Mr. Henry Mansfield, a man of affairs and a warm personal friend of Mr. Thompson. The influence of that relationship in arousing Mr. Thompson's resentment, was brought out on cross-examination (Printed Record, p. 492) as follows:

"A. As I say, Mr. Mosher up until that time I always liked; I thought very kindly of him. I liked Mrs. Mosher

and I liked the whole Mansfield family; they were people I had come to know and I liked them; and that night on the train made me pretty angry at Mosher and I went after him just about as hard as I was capable of going after any man for anything."

Mr. Thompson further testified, (p. 491):

"A. Well, Mr. Mosher and I were not very friendly after that. Of course, there were business reasons why we had to be civil * * *. A. We were on good business terms, so far as it was necessary to be. Mosher was interested in both the gas company and the insurance company and I had to be on reasonably good terms with him."

This transfer of stock was almost contemporaneous with that of R. E. Moore to Dr. Hamer, another director, and the price was the same as that paid by Dr. Hamer. It will serve no purpose to review the further testimony, which is voluminous and is found in the printed record at pages 492 to 505, inclusive. All of the testimony establishes the transaction as above related. Mr. Thompson was able, without difficulty, to maintain its validity and enforce his securities against a contest by the creditors of Mosher and Ontario. The circumstance that the plaintiffs, in their brief, forebore the presentation of the evidence directed to the *bona fides* of the stock sale, while holding the burden of impeaching the sufficiency of the finding of the state court upon the evidence, indicates that the evidence is overpowering. The references given are sufficient to indicate that upon the present writs of error this court should not seriously consider disturbing the finding of the State Supreme Court that the evidence was not sufficient to overcome the *bona fides* of the stock transfer in question, nor to indicate that Mr. Thompson knowingly attested a false report at some period long anterior to the date of the transaction.

The next incident mentioned, by way of vituperation only, is that Mr. Thompson retained stock in the Lincoln Gas Company, of which he was the president and manager, and accumulated more as he could purchase it. But the recited incident, while true, only tends to establish Mr. Thompson's faith in the business character of Mosher. The testimony is undisputed that Mr. Thompson had imperious and absolute control of the management both of the gas company and of the Farmers and Merchants Insurance Company. The reference at page 100 to the circumstance that Mr. Thompson owned in excess of \$100,000 of the stock of the gas company, which he transferred some seven years subsequent to the failure of the Capital National Bank, is so far removed that Mr. Thompson is not called upon to take any issue upon the unfounded assertion relating to purely private affairs having no connection with the suit. There is no proof, however, to impeach the absolute rectitude of Mr. Thompson's dealings with the stock of the companies of which he was manager.

The next incidents referred to (plaintiffs' brief, pp. 100, 101) are a letter of the Comptroller which bore date February 16, 1892, and a reply thereto, dated February 19, 1892, and a further short letter by the directors to the Comptroller, of date October 14, 1892. But these instances like the others referred to, are long subsequent to the date of the last attestation of an official report by Mr. Thompson. One letter is upwards of seven months after Mr. Thompson's latest attestation and the other is upwards of one year and four months. They, therefore, have no significance upon the issue of *scienter*, as that issue must affect Mr. Thompson on and prior to July 9, 1891.

The testimony of Mr. Thompson, to which reference is made in the brief, in connection with these instances, prove circumstantially his utmost good faith and belief in the integrity and value of the assets, which were the subject of discussion, and disprove every imputation against his good faith.

In this connection reference is made to the incident of Mosher's paper carried by the bank, but the fact is that none of the irregularities were ever disclosed to Mr. Thompson. The record showing (Printed Record, p. 445) is embraced in Mr. Thompson's testimony, as follows:

"Q. Did you have any knowledge that the notes of Mosher and Outcalt were in the bank in any considerable sum, or in any sum?

"A. No, I had no knowledge of any of those things; they never came to my attention in any way, through any of the meetings of the bank; there never was any report from the executive committee, either, that criticised any of the conditions in the bank,—that is at none of the meetings at which I was present.

"Q. Did you ever authorize the bank's taking paper of Mosher to the extent of \$85,000?

"A. No sir, I didn't even know of it.

"Q. Or of Outcalt to the extent of \$75,000?

"A. No sir; I didn't even know of it.

"Q. Or in any sum whatever?

"A. No—Never.

"Q. Did you ever concur in their borrowing from the bank?

"No sir.

"Q. Were you ever given an opportunity,—was the question ever presented to you?

"A. No sir,—never in any shape whatever."

There are in plaintiffs' brief numerous assertions that a director could not have been ignorant of the frauds perpetrated by the managing officers; but as applied to Mr. Thompson those assertions are directly in the teeth of the uncontradicted evidence. Mr. Thompson testified (p. 441) that he believed in the solvency and stability of the bank up until the time of its suspension; (pp. 441, 442) that he had no knowledge of false entries or statements in the reports to the comptroller; (p. 445) that he had no knowledge of false entries in the bank's books, nor

that the bank was carrying paper of the Western Manufacturing Company; (p. 459) that he had no knowledge of the manipulations of the items of bills of exchange nor that credits were wrongfully made to the interest paid account, nor that there was a false footing of the deposit ledger; (pp. 459, 460) nor that the certificate of deposit account was at any time overdrawn. The record shows without dispute that the frauds perpetrated by the managing officers were concealed from Mr. Thompson. This explains the course pursued in the vituperative brief, of declining to enter upon any discussion of the entire proofs directed to any particular point or incident. The undisputed proofs remove every aspersion cast upon Mr. Thompson, upon every incident brought into the inquiry, whether relevant or irrelevant to the issue.

Reference is next made to the circumstance that a Mr. Dorgan, in Mr. Thompson's absence, on the morning after the failure of the bank, filed a chattel mortgage from Mr. Mosher to Mr. Thompson, but the undisputed testimony of Mr. Thompson (p. 763), touching the authority of Mr. Dorgan, is as follows:

"Q. Was Mr. Dorgan employed by you in any capacity what ever or authorized to represent you in any capacity whatever, in the month of January, 1893?

"A. No sir, then nor at no other time.

"Q. He never was employed by you as agent in any capacity of any sort?

"A. No sir.

"Q. Did you have any knowledge prior to yesterday, that it was even claimed that he had pretended to file any instrument in your behalf in Lancaster County?

"A. I never heard of it before."

This Mosher chattel mortgage, delivered and filed after the failure, was not made under any pre-arrangement of any sort (p. 764) and it was proved that Mr. Thompson never claimed any rights under it, but promptly repudiated it.

It is stated in the brief of plaintiffs (p. 108) that "Mr. Jones testified that this account (the gas company account) received a credit of \$10,000 growing out of the fraudulent certificate of deposit for \$100,250, issued in the name of J. E. Hill, Treasurer." It is true *Harry T. Jones* stated that such was his conclusion from his examination of the books of the bank, but it was indisputably proved by unimpeachable independent testimony, that the *inference* of *Mr. Jones* was *false*. (See to this point the testimony of J. K. Honeywell, Secretary and Bookkeeper of the gas company, Printed Record, pp. 530 to 536.) The source of the credit was the proceeds of a note of the gas company negotiated in Ohio, which was subsequently paid by the gas company. On the face of all the proofs there is not even a dispute as to the *bona fides* of the credit to the gas company of which Mr. Thompson was president and managing officer.

There is next a reference to the circumstance that the Farmers and Merchants Insurance Company, of which Mr. Thompson was manager, had assumed liability upon two checks that had been given to savings banks in Lincoln just prior to its suspension and on which the savings banks, by reason of its suspension, had suffered a loss. The circumstance is, in itself, highly creditable to Mr. Thompson, who detailed the incident at page 444. The insurance company had a large cash balance accumulated at the beginning of the year. Just prior to Mr. Thompson's departure for Terre Haute, where he was when the bank failed, he had given three withdrawal checks in order to reduce the company's idle balance and obtain interest from savings banks. Two of these banks had failed to make withdrawals upon the checks from the Capital National Bank before the failure. In this situation Mr. Thompson thought the delivery of the checks was so short a time before the failure, that the insurance company should save the savings banks harmless from the loss. There is no other significance to the transaction. It occurred after the

failure of the bank and could have no possible bearing upon the issue of *scienter* as applied to attestation of official reports by Mr. Thompson.

The repeated references in the brief to conveyances of real estate by Mosher to Mr. Thompson are absolutely without significance on the issue of *scienter* as applied to Mr. Thompson's attestations of official reports. They were long subsequent to any attestations of official reports by Mr. Thompson. They followed, and were incident to a pledge of gas stock to Mr. Thompson as security for the purchase money note for the bank stock. The substance of the voluminous testimony directed to these transactions is embodied in the following general statement taken from the examination of Mr. Thompson (Printed Record, Bill of Exceptions, p. 495):

"He asked me if I would as soon have land as security as the gas stock. I said yes. There was very little talk about it; but I said I would, and he brought me over deeds to several pieces of land up in York and Hamilton counties. I don't know just how many or which pieces he brought, then, or later. With the exception of the piece in Lancaster County, which had no mortgage on it, they all had large mortgages. I wasn't looking for bears, or anything of the sort. I was very willing to give him what he wanted, and to take what he offered to me as security for that note. Then when he came and asked me to change some pieces, that I had, for others that he wanted to give me, saying that he had sold, or could sell some of those that I had, I very readily exchanged with him. And the thing ran along in that way until the time of the failure; and then I could see, without putting on my spectacles that the whole thing had been done to bunco me. That was his scheme."

The rectitude of Mr. Thompson's personal and official conduct is securely established by the ample recitals quoted from the record. There is no ground, based on the record, for disapproval of the finding of the State Supreme Court.

that this and other incidents mentioned in the brief of plaintiffs in error, tend to establish his good faith, and to disprove the charge of *scienter*.

In reference to the Donald, Lawson & Simpson account, we have heretofore explained that when the increased capital was subscribed and Mr. Thompson and other influential men became stockholders, and coincident with the change of the name to the "Capital National Bank," there was a meeting held for the purpose of organizing the new bank and taking over the assets of the old bank. At this meeting a committee was appointed to check over the assets and effect the transfer, consisting of W. W. Holmes, A. P. S. Stuart and C. W. Mosher. At that meeting Mosher and Outcalt mentioned that there was an account with the failed bankers, Donald, Lawson & Simpson, of New York, and that account would not belong to the new bank; but would be taken care of by Mosher and Outcalt. It was reported to Mr. Thompson that the item had been taken out of the bank (p. 430). It was indisputably proved that Mr. Thompson confided in the arrangement then made and had no knowledge whatever that any part of the item ever entered the assets of the Capital National Bank. (p. 430.)

The contention that the findings of the State Supreme Court are unsupported puts on the plaintiffs in error the *onus* of analyzing all of the evidence directed to the particular point at issue. When the evidence is opened every incident disclosed by the record, with which Mr. Thompson had the slightest connection, proves his high character and the ethical purity of his business and personal transactions. Had the judgment been otherwise than in his favor it must necessarily have been reversed upon a review in this court, for want of any evidence in the record to establish his moral delinquency, in *any transaction*, or to show that he knowingly attested an official report which contained any false statements. From whatever angle the

record is viewed, the proofs force the conviction that the judgment of the State Supreme Court is correct. It should therefore be affirmed.

Respectfully submitted,

JOHN F. STOUT,

HALLECK F. ROSE,

ARTHUR R. WELLS,

*Counsel for Defendant in
Error, David E. Thompson*

FILED

JAN 11 1916

JAMES D. MAHER

CLERK

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1915.

NO. 163

JONES NATIONAL BANK, PLAINTIFF IN ERROR,
VS.

CHARLES E. YATES, D. E. THOMPSON, AND
LOUISE HAMER, ADMINISTRATRIX, ETC.

NO. 164

BANK OF STAPLEHURST, PLAINTIFF IN ERROR,
VS.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF
NEBRASKA.

**SUPPLEMENTAL BRIEF OF DAVID E. THOMPSON,
DEFENDANT IN ERROR, PRESENTING THE
QUESTION THAT THE COURT IS WITH-
OUT JURISDICTION.**

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OUT JURISDICTION.**

Subject to the court's grace, we desire, in behalf of defendant in error David E. Thompson, to submit the following presentation of the issue of jurisdiction, by supplemental brief.

The plaintiffs in error laid no foundation in the state courts for the review of federal questions in this court.

The decision of the state supreme court upon the federal question involved was in response to a claim and issue tendered by the defendants in error.

The judgments complained of were entered by the State Supreme Court, January 31, 1913. The entries vacating the orders for rehearing and denying rehearings were entered April 3, 1914. The writs of error were allowed April 27th, 1914, and were docketed in this court May 26, 1914. This court, therefore, must look for its authority to review the decisions of the Supreme Court of Nebraska in question, to Section 237 of the Judicial Code, as it existed prior to the amendment of December, 1914, (U. S. Rev. St. Sec. 709), which provides as follows:

"A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity especially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon writ of error. * * *"

When the cases were here on the previous writs of error sued out by the present defendants in error, a motion to dismiss the writs for want of jurisdiction was filed by the present plaintiffs in error, supported by a brief in which it was repeatedly asserted and pointed out that the *plaintiffs below* tendered no issues and made no claims based upon any federal statute. At page 19 of the brief referred to, supporting the motion to dismiss, it was said:

"The amended petition appearing on pages 7 to 12 of the printed record need hardly be copied by us at large, but we assert that not one sentence, line or paragraph thereof appears in the whole petition setting up a federal right belonging to the defendant in error whereby the defendants in error were made to rely or claim under or by virtue of a federal law."

The power of this court to review the judgments then under consideration existed only because the plaintiffs in error in those cases were shown by the record to have specially set up and claimed immunity under Section 5239 of the revised statutes of the United States, and the federal right so claimed had been denied by the judgments of the highest court of the state, as the brief of *Mr. Thompson* and the *reply brief* filed therein show.

The petitions of the plaintiffs presented the theory that the liabilities charged against defendants were independent of and unaffected by any statute of the United States. They made no allegations that the Capital National Bank was a national banking association, nor that the defendants were directors of a national banking association, nor that any of the acts complained of were done pursuant to any act of Congress, or as directors of any national banking association. There was no allegation that either one of the financial statements annexed to the petitions and marked Exhibits A and B were addressed to the Comptroller of the Currency, and the name or title of the Comptroller did not appear in either exhibit or in the petition. The designations, in a very general form, of financial statements complained of, other than Exhibits A and B, were as follows:

"This plaintiff avers that on and between July 23, 1884, and January 21, 1893, the defendants with the fraudulent intent and purpose as aforesaid, during all of the said time, made, allowed, caused and permitted to be made at divers intervals, false statements of the condition of said bank as to its resources and liabilities with the intent and purpose

of deceiving the plaintiffs and others as aforesaid, and caused, acquiesced in, allowed and permitted said false statements and each of them severally to be published in newspapers of general circulation in the city of Lincoln, Nebraska, which said papers aforesaid were of general circulation in the state of Nebraska, and sent and caused to be sent to and received by plaintiff said false statements aforesaid through the U. S. mails and otherwise, and which were received by plaintiff." (Printed record in present suit *Jones National Bank case*, pp. 4, 5.)

The quoted averments charged no fault with any official statements to the *Comptroller of the Currency*, published under command of the federal statutes. The plaintiffs in the subsequent proceedings, had after reversals in this court, did not reform their petitions nor alter their attitude in the respects noted, but sought still to avoid the making of any claim under any authority of the United States, and plaintiffs actually obtained judgments upon the second trial in the district court of Seward County, Nebraska, *purporting to rest wholly upon nonfederal grounds*.

While the proofs were not sufficient to sustain any non federal ground of liability, Mr. Thompson anticipated a possible misapprehension or perversion of the proofs in this respect, and requested special findings defining the grounds upon which any adverse judgment should rest. In answer to one of such requests, the trial judge wrote in the journal of the court, the following words:

"Responsive to the request for a conclusion of law embodied in the first request, the court finds that plaintiff is entitled to recover in an action of deceit *under the principles of the common law, exclusive of the requirements of the national banking act*." (Printed record, *Jones National Bank case*, p. 28.)

Upon entering the original findings, of which that quoted was one, the court orally announced that the proofs in his opinion were not sufficient to entitle plaintiffs to

recover upon the official reports under the authoritative rules announced by this court on the previous writs of error. However, the theory of the trial court must be drawn by the appellate courts from the entries upon the journal, and Mr. Thompson made further requests calculated to have the theory of the trial court's decision more clearly reflected in the journal. In answer to one of these requests, the trial court stated and entered upon the journal, the following:

"Respecting the third interrogatory, the Court finds as a conclusion of law that the liability of the defendant, David E. Thompson, in an action of deceit *under the principles of the common law is not founded upon the attestation of the official reports referred to in the third interrogatory*, but that *such statements are corroborative of the unofficial and voluntary statements made by the bank*, as set forth in the answers to the first and second additional interrogatories, and *such liability* (that is, a liability 'under the principles of common law, not founded upon the attestation of official reports') is founded upon the truth of the allegations of plaintiff's amended petition and embodied in the general findings of the court." (Printed record, *Jones National Bank Case*, p. 44.)

The last quoted finding was apparently the adoption of an argument addressed to the trial court that the newspaper publications were voluntary and unofficial acts, because the *statute* did not compel the publication of the *verifying affidavit* of the president and cashier, nor the *attestation* of three directors. It thus appears that the plaintiffs, up to the time of the rendition of the final judgments which ended the authority of the trial court over the litigation, consistently sought to rest their right of recovery upon nonfederal grounds, and that it was the obvious intention of the plaintiffs, in the event the judgments resting upon the quoted findings were affirmed, to circumvent the previous judgments of this court upon the ground that the present judgments were rested upon nonfederal grounds of liability.

In the subsequent appellate proceedings, prosecuted in the state supreme court, the defendants were the moving parties, and the defendants, and not plaintiffs, presented claims under the statutes of the United States. The foundation for these claims was laid originally in the answers. The answer of Mr. Thompson alleged specifically that the Capital National Bank mentioned in the amended petition existed under and by virtue of the national banking act, and that defendant was a director of that bank. His answer also alleged that his obligations as a director were defined by the national banking act, and that the cause of action embraced charges which, if true, "constituted a violation by this defendant as a director or stockholder, of his duties as such director or stockholder as laid down and defined in the national banking laws of the United States above referred to, concerning the government and management of national banks. And this defendant alleges that if any liability attaches to him as a director or stockholder of said bank for any act done or duty neglected, as set forth in said amended petition or otherwise, that such liability is determined and controlled by the national banking act concerning the management of national banks; and that in determining the liability of this defendant there is necessarily involved the construction of said National Banking Act relating to the duties of directors and stockholders of national banks." (Printed record, Jones National Bank case, p. 11.)

In laying the foundation for appellate proceedings, Mr. Thompson, in a motion for a new trial, presented to the trial court, made, among others, the following assignments (printed record, Jones National Bank case, pp. 42, 43):

"19. Upon the evidence this defendant is entitled to judgment in his favor, as a matter of law.

"24. The facts and conclusions of law found by the Court show that the judgment is based wholly, or in part,

upon statements of the financial condition of the Capital National Bank 'published in the newspapers.' By the National Banking Act such newspaper publications of official reports were specifically required to be made and were not voluntary or unofficial acts, and the findings of fact and conclusions of law stated in said judgment in so far as they find or assume such newspaper publications to be voluntary and unofficial acts are in conflict with said act of Congress and with the law of the case established in and by the appellate proceedings heretofore had herein.

"28. The Court erred in each of its conclusions of law stated in answer to this defendant's 4th request for additional findings. In so far as it is therein found that defendant's common law liability rests 'upon the statements * * * setting forth the financial condition of the bank which were published in the newspapers' it bases a common law liability upon official acts enjoined by the National Banking Act, contrary to and in violation of Section 5239 of the Revised Statutes of the United States and contrary to the law of the case established in and by the appellate proceedings heretofore had herein. The finding of facts contained therein is not sustained by sufficient evidence, nor by any evidence, and is contrary to the undisputed evidence.

"30. The facts specially found against this defendant on the Court's own motion are not sustained by sufficient evidence nor by any evidence and are contrary to the undisputed evidence."

Upon the foundation thus laid, the defendants presented their claim of federal right, based on the provisions of the National Banking Act, to the supreme court of the state upon appeal. No federal right had been claimed by the plaintiffs in the trial court, and plaintiffs filed no pleadings, beyond dilatory motions in the supreme court, until subsequent to the entry of final judgments of reversal.

The judgments in the trial court showed upon their face that they were not rested upon any federal ground, and that they, in terms, excluded any right of recovery in

plaintiffs, based upon the provisions of the national banking act. It was not the judgment of the supreme court on appeal that excluded the plaintiffs from the right to recover upon the provisions of the national banking act. That end was accomplished by the findings and judgment of the district court of Seward County, not by any ruling adverse to the plaintiffs, but by a ruling invited by them in their own favor to which plaintiffs took no exception, and from which they prosecuted no appeal.

Certainly, the federal question was considered and determined in the supreme court upon appeal; but the issue and claim which presented to the supreme court on appeal the consideration of a federal question was *tendered exclusively by the defendants*. There was no denial of a federal claim or right to the plaintiffs. They made no such claim. The judgments below to which they took no exception, on their face excluded such claim in their behalf. There was, therefore, no denial to the plaintiffs by the state supreme court of any claims of federal right.

The purpose of the present writs of error, and no doubt their logical end in the event they are ruled in plaintiff's favor, is to reverse the judgments of the state supreme court, *and to reinstate the judgments of the district court of Seward County*. In other words, it is sought to reinstate the judgments of the trial court which, on their face, rest the liability of the defendants wholly upon non-federal grounds, and contain express findings or conclusions that the defendants incurred no liability upon any official published statements made pursuant to the National Banking Act, notwithstanding the plaintiffs took no exception to any of the findings or conclusions of the trial court which definitely excluded the application of the federal statute.

The plaintiffs were quite content, throughout all the appellate proceedings which eventuated in reversals by the state supreme court, to rest upon those findings in their

favor, and thus be rid of the embarrassment of adhering to the rule of proof declared applicable by this court on the former writs of error. In the Supreme Court of Nebraska, the plaintiffs lost their judgments, based on nonfederal grounds, because the evidence failed to show that defendants made or participated in any financial statements of the condition of the Capital National Bank, other than the official reports. After the total failure of evidence to sustain the nonfederal grounds of liability had been exposed and the art of so framing the judgments as to exclude review by defendants in this court, had failed on appeal, the plaintiffs found themselves without exceptions to the exclusion of any federal right below, and without any standing to complain of the denial of relief under the provisions of the National Banking Act.

It is, therefore, respectfully submitted that the judgments of the Supreme Court of Nebraska involve no denial *to the plaintiffs* of any federal right *asserted by them*, and that upon the records showing the facts above detailed, this court is without power to entertain the present writs of error, or to review the judgments of the state court.

The deliberate and studied purpose of plaintiffs to assert a cause of action resting exclusively on nonfederal grounds, and the explanation of the absence of all averments that the bank was a national banking association, or that any of the alleged misstatements were contained in official reports, or that such statements were addressed to the Comptroller of the Currency, or published pursuant to the laws of the United States, or that in doing the acts complained of, defendants were officiating as directors of a national banking association, are quite obvious. The briefs of both sides assert, and the reports show, the following historic incidents of the litigation:

As *Bailey's case* was first brought in Lancaster County, where defendants resided, a removal petition was sus-

tained by the U. S. Circuit Court, where final judgment was rendered in favor of defendants, upon the sustaining of a demurrer to his petition. That judgment was sustained in the Circuit Court of Appeals, Eighth Circuit. *Bailey v. Mosher*, 63 Fed. 488. Since amendment could not oust the federal court of its jurisdiction, the companion cases of the *Jones National Bank*, *Bank of Staplehurst* and *Utica Bank*, were dismissed without prejudice, and brought in the county of the residence of plaintiffs, upon petitions which charged only nonfederal grounds of liability. The introduction by defendants of federal questions by affirmative averments in the answers, could not sustain removals. But defendants attempted to remove, upon the theory that the causes of action were not rested wholly on nonfederal grounds. Upon motions to remand, plaintiffs maintained the nonfederal character of the causes of action pleaded in the present suits, *Bailey v. Mosher*, 74 Fed. 15.

The plaintiffs have enjoyed the high privilege of a trial in the forum which they selected, in the state court, in the county of their residence, and have prevented removals into the appropriate federal court of their district, solely by their maintenance of the proposition that their petitions set forth causes for relief resting wholly on nonfederal grounds, and that the assertion of federal claims by defendants in their answers, were not good grounds for removal. In order to maintain that privilege, they have necessarily refrained from offering any amendments by which allegations of the federal character of the failed bank, and the official character of the financial statements complained of, and that defendants acted in the character of national bank directors, should be introduced into their petitions as parts of the statement of their causes of action. Had such amendments been made, even after the review in this court, defendants could have removed by a timely application, made after the *first assertion by plaintiffs* of rights under the statute of the United States.

Having successfully maintained their right to litigate in the state court, by a distinct disavowal of any claims under any statute of the United States, plaintiffs, upon suffering defeat in the highest court of the state upon a claim of federal right *set up by defendants*, are wholly without the privilege of suing out writs of error granted by Section 237 of the Judicial Code, as that section existed when the present writs were sued out. That section limits the privilege of the writ to the suitor who has taken the initiative in the state court in the assertion of a federal right, and conditions the right of review under the writ upon the denial of such federal right, in the assertion of which he took such initiative.

The records here not only show that *defendants* had the initiative and sole function of asserting the federal right upon which the state court pronounced judgment, but that plaintiffs distinctly and persistently *disavowed* all claims of federal right, to the time of the rendition of final judgments on appeal in the highest court of the state. It does not follow that because the distinct assertion of a federal right gave the *defendants* standing to prosecute error in this court, in event of an adverse decision, the *plaintiffs* should enjoy the same privilege, in event the decision should be in favor of the federal right, asserted by *defendants*. The assertion of the federal right by *the plaintiff in error*, is an indispensable requisite to the power of review on writs of error by this court.

Having shown that the plaintiffs consistently maintained their assertion of nonfederal grounds of liability, only, until after they had suffered adverse judgments in the highest court of the state, we now present the nature and effect of their presentation of federal rights for the first time by *motions for rehearings*, filed in the supreme court of the state, after the entry of final judgments.

The motion for rehearing in the *Jones National Bank case*, printed record, pp. 56-61 (printed record, pp. 56-61, Bank of Staplehurst case) was introduced by the following, among other recitals:

"The undersigned appellee respectfully requests the court to grant a rehearing herein with view to the correction of what we think erroneous interpretation of the decision of the United States Supreme Court in *Yates v. Jones Nat. Bank*, 206 U. S. 158; of the statutes of the United States upon which that case is predicated."

The second assignment of the motion for rehearing contains the following:

"It appearing therefore that this case is, *by the decision of this court*, based and predicated upon the national bank act and the violation of the provisions thereof, *it follows* that the measure of responsibility and rule of liability provided by that act, should be applied, and that in so doing, this court is bound by the United States Supreme Court's construction and interpretation thereof in this case; that this court's construction and interpretation of the national bank laws, Title 62 of the Rev. St. of the U. S. and Section 5239 thereof, is in conflict with the decision of the United States Supreme Court in this case and that the plaintiff has therefore been, *in effect*, denied a right and privilege conferred upon it by the constitution and statutes of the United States, of Title 62 of Rev. St. of the U. S. and especially Section 5239 thereof."

It is submitted that the foregoing assignment is on its face, not the complaint of the denial by the court of any federal right claimed by *plaintiffs*, but is, on the other hand, a complaint that in deciding in favor of the federal right, *asserted by defendants*, the court so misconstrued the federal statute as "in effect" to deny a right and privilege conferred upon plaintiff by the statute of the United States. The assignment was not presented as a complaint that any federal rights set up or claimed by *plaintiffs* had been denied, but that the court had erred in deciding a federal right asserted by *defendants*. This attitude of

the plaintiff in the motion for a new trial is definitely stated and defined in the *eighth* assignment, which after quoting the opinion of Judge Letton, characterizes and complains of the decision of the state supreme court in the following words:

"Thus assuming and deciding that the United States Supreme Court held our petition necessarily presented a federal question or that it did not state a cause of action for deceit at the common law—whereas that court did not decide that our petition did not state a cause of action for deceit at the common law, not that it necessarily presented a federal question, but based its judgment and conclusion on the fact that the *proof* in the record then before it disclosed that plaintiff had relied for recovery, on reports published pursuant to the directions of the Comptroller of the Currency under the requirements of the national bank act. *The decision of the United States Supreme Court concedes us the right to maintain this action under the present petition as an action at common law for deceit, provided, the record shows we have not relied for recovery upon any act or duty required or prescribed by the express commands of the federal statutes, i. e., reports published pursuant to the call of the Comptroller. The findings of the trial court show it expressly based our right to recovery upon the voluntary and unofficial statements and reports and not upon the official reports. And the evidence contained in the record sustains the findings and judgments.*"

Assignment 11, of the motion for rehearing, is as follows:

"In his opinion Judge Hamer assumes that the United States Supreme Court decided that this case could not be maintained at common law for fraud and deceit, whereas, the Supreme Court did not so decide, *but concedes plaintiff the right to maintain this action as at common law for fraud and deceit, so long as recovery is not based upon a violation of any of the express commands of the national bank act.*"

Assignment 14, of the motion for rehearing, is as follows:

"This court erred in not deciding that this case could be maintained for fraud and deceit at common law, as predicated upon false representations exclusive of any acts done pursuant to the express commands of the national bank act, and that the evidence and findings of the trial court is sufficient to sustain the judgment on that theory."

The plaintiffs, thus, in their motions for rehearings, counted on the circumstances that the judgments of the trial court, appealed from, by express findings, rested plaintiffs right of recovery *wholly upon non federal grounds* and *excluded* the application of the statute of the United States. In choosing thus to restrict and confine their own claims to the so-called unofficial and voluntary statements, and by that means to preserve their right to trial in the state court, and to avoid the risk of a review upon writs of error prosecuted by their adversaries, the plaintiffs were exercising an undoubted privilege. If they had so reformed their petitions as to openly assert a cause of action founded upon a statute of the United States, at any time before judgment in the trial court, defendants by petitions for removal, based on the amendments which *first presented the claim of federal rights*, could have procured a trial on the merits in the federal court. Plaintiffs cannot alter their position in that behalf after suffering adverse judgments on appeal in the highest court of the state, and thus circumvent defendants, at that stage of the litigation, of the right of removal.

Complaints are made in the motions for rehearings, inconsistent, no doubt, with the theory of the assignments quoted, that the state supreme court misinterpreted the provisions of the National Banking Act; and it may become pertinent to point out the proceedings had upon those motions, to ascertain whether the claims of federal rights therein made are reviewable in this court.

The motions for rehearings were only entertained through the participation of the Chief Justice, who at the original hearing had certified to his own disqualification, because of his having previously been consulted by one of the plaintiffs—a disqualifying act under the provisions of a local statute—and the order allowing the rehearings contained the protest of three of the judges against its entry on the journal, on the ground that the participation of the disqualified member of the court rendered the order void (Printed Record, Jones National Bank case, pp. 65, 66). Mr. Thompson moved to vacate the order granting rehearings, on the ground that it was void, and that the equal division of the qualified judges upon the motions for rehearing was, in law, an adherence to the previous final judgments of reversal. The motion to set aside the order granting the rehearing was sustained and an order entered denying the rehearing (Printed Record, Jones National Bank case, p. 92).

The authoritative written statement of the proceedings on the motions for rehearing was made by Judge Barnes and entered in the journal of the court. The journal entry, signed by Judge FAWCETT, as acting Chief Justice, was as follows:

“When this case was decided a constitutional majority of the court adopted the opinion reversing the judgment of the district court, and judgment was rendered accordingly. A motion for a rehearing was presented, and on that question the court was equally divided. A motion was then made to vacate and set aside the former judgment. The court being equally divided, the motion was lost. The motion for rehearing having been declared lost our former judgment reversing the judgment of the district court stands unchanged for want of a constitutional majority to set aside the same.” (Printed Record, Jones National Bank case, p. 94.)

Since the void proceedings for entertaining the motions for rehearings were vacated, and set aside, and held for

naught, the records show that the motions for rehearings were not entertained, and the federal questions sought to be presented therein by plaintiffs in their own behalf were not litigated or decided. The motions for rehearings are, therefore, unavailing, and the claims set up for the first time therein are not subject to review in this court.

To maintain a writ of error under Section 237 of the Judicial Code, the federal right must have been claimed by the plaintiff in error in the state court in the manner therein prescribed. *Oxley Stave Co. v. Butler County*, 166 U. S. 648; *Greenbay & M. Canal Co. v. Patent Paper Co.*, 172 U. S. 58; *Michigan Sugar Co. v. Michigan*, 185 U. S. 112.

It must appear from the face of the record that the plaintiff in error asserted his federal right. *Maxwell v. Newbold*, 18 How. 511.

It is not sufficient that a federal claim was made in argument. In so deciding, Mr. Chief Justice FULLER, in *Yesler v. Board of Harbor Line Commissioners*, 146 U. S. 646, said:

"The averment in relator's petition is that, 'he is now and has been for thirty years last past the owner of the following described property, to-wit, the property commonly known as Yesler's wharf and dock and the upland abutting on the shore upon which said wharf and dock were constructed.' It is said *in argument* that he is an original patentee of the United States, under the 'Donation Act' of September 27, 1850, (9 Stat. at L. 496, Chap. 76) of a tract of about one hundred and sixty acres of land, entered by him in 1852, embracing all the upland mentioned in the petition and bounded on the west by the meander line of Elliott Bay. *But this is not so stated in the petition*, and whatever might be inferred as to the character and source of his ownership, it cannot reasonably be held that relator *by this allegation* specially set up or claimed a title, right, privilege, or immunity under the Constitution, or a statute of, or authority exercised under, the United States in this behalf."

The federal question must be raised before the entry of final judgment in the highest state court. *Simmerman v. Nebraska*, 116 U. S. 54; *Bobb v. Jamison*, 155 U. S. 416; *Morrison v. Watson*, 154 U. S. 111; *Winona & St. Peter Land Co. v. Minnesota*, 159 U. S. 540; *California National Bank v. Thomas*, 171 U. S. 441; *Scudder v. Coler*, 175 U. S. 32.

A number of the cases last cited hold that the federal question cannot be introduced into the record by petition for rehearing filed in the highest court of the state after the rendition by that court of final judgment. Obviously the suitor's only means of throwing upon the court the burden of deciding a federal claim, is to present his federal right before the entry of final judgment. The denial of a motion or petition for rehearing may well be based on the ground that the party presenting the motion or petition for rehearing has no standing to litigate issues not presented to the court for decision before his case had passed to final judgment. The settled rule of this court is that the mere denial of a motion or petition for rehearing, in which the plaintiff in error for the first time asserts a federal claim, does not constitute an adverse decision entitling the moving party in that proceeding to review the federal question in this court. *McCorquodale v. Texas*, 211 U. S. 432; *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 118; *Chicago I. & L. R. Co. v. McGuire*, 196 U. S. 129; *Cleveland & P. R. Co. v. Cleveland*, 235 U. S. 50; *Miller v. Texas*, 153 U. S. 535; *Capital National Bank of Lincoln, Nebr., v. First National Bank of Cadiz, Ohio*, 172 U. S. 426.

The case of the *Capital National Bank*, last cited, and the four companion cases ruled by the same opinion, were incidents of the same bank failure out of which the present suits arose, were upon records showing the distinct presentation, in a motion for a rehearing, of the issue that the judgment was violative of the provisions of the Na-

tional Banking Act, and that such motion for a rehearing had been denied. In those cases there were allegations in the petitions of plaintiffs, filed in the court of original jurisdiction, that the Capital National Bank was organized under the National Banking Act, and that its affairs were being administered by a duly appointed receiver, who had possession of its assets. Until the motion for rehearing was presented in the supreme court, it had not been asserted by the receiver of the bank that any judgment which might be rendered for plaintiff would be in contravention of any provision of the National Banking Act. In that state of the record, this court denied its own power to review the judgments of the state supreme court.

It is submitted that the presentation of the federal right by the defendants, on their own initiative, which threw upon the state supreme court the burden of deciding the federal right which defendants asserted, cannot be availed of by the plaintiff, who had consistently rested his right to recover *on nonfederal grounds*, as a basis for the prosecution of a writ of error by the *plaintiff* to this court.

It is also submitted that the right to maintain the previous writs of error in this court, which were sued out by the defendants, did not rest upon any assertion *by the plaintiffs* in the state court of a cause of action based upon a statute of the United States. On the contrary the maintenance of jurisdiction under the previous writs of error in this court depended upon a record showing the *affirmative assertion by the defendants* (who were then plaintiffs in error) of federal rights which were denied by the decision of the highest court of the state. To this effect it was stated in the opinion of this court in *Yates v. Jones National Bank*, 206 U. S. 167, as follows:

"A motion to dismiss first requires attention. The asserted want of jurisdiction in this court is based upon the contention that no federal question was raised in or decided by the state court. But as will hereafter appear,

the record plainly shows that both in the trial and appellate courts an immunity was claimed under Sec. 5239 of the Revised Statutes, at least in respect to the rule of liability applied below, and such immunity was expressly denied by the state court, and there is, therefore, jurisdiction even if, in other respects, jurisdiction might not be exercised, as to which we are not called upon to decide."

Upon the record facts detailed, and the authoritative judgments of this court cited, it is urged that the plaintiffs have laid no foundation for the present writs of error, that this court is without power to entertain the writs, and should dismiss them for want of jurisdiction.

We have not overlooked the December 23, 1914, amendment of Section 237 of the Judicial Code, conferring power on this court, by *certiorari*, to review judgments of the highest courts of the state in favor of the federal right claimed. The writ of *certiorari* is, of course, a writ of grace, and not of right, and can only issue upon the order of this court. The amendment does not seem to enlarge the right to the writ of error, which is a writ of right, and is subject to all of the limitations of the original section. The amendment does not appear on its face to operate retroactively, and we assume, as a matter of course, that the jurisdiction of this court must rest on the statute as it existed when the writs were sued out and docketed. The cases were docketed and pending in this court long prior to the passage of the amendment mentioned.

Respectfully submitted,

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